

3 Am. Jur. 2d Agency XIII A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Agency

John Bourdeau, J.D., Romualdo P. Eclavea, J.D., Jill Gustafson, J.D., and Lucas Martin, J.D.

XIII. Undisclosed Agency

A. In General

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3 Am. Jur. 2d Agency § 287

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XIII. Undisclosed Agency

A. In General

§ 287. Generally

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Where the other party to a transaction conducted on one side by an agent knows that the agent is acting for a principal and has notice of the principal's identity, the principal is considered as being "disclosed"; where such other party knows or has reason to know that the agent is or may be acting for a principal but is unaware of the principal's identity, the principal for whom the agent is acting is considered to be "partially disclosed"; where the third person has no notice of the fact that the agent is acting as such for a principal, the agency and principal are "undisclosed."¹

From the very nature of the situation, the third person's rights do not depend upon his or her knowledge that the agent was acting for someone else because it is evident that anyone dealing with an agent for a wholly undisclosed principal believes that he or she is dealing with the agent only and relies solely upon the agent individually.² Thus, the agent of an undisclosed principal may be held liable on the contract as the real obligor because he or she contracted in that capacity, and an undisclosed principal may be held liable because as the recipient of the deal, he or she should also assume its burdens.³ Likewise, a partially disclosed principal will become a party to a transaction between the agent and a third party even if the third party is unaware of the name of the principal.⁴

For an agent to avoid personal liability for the acts of the principal, disclosure of the principal must be made at the time of the contracting; otherwise, either the agent or the subsequently disclosed principal may be held liable.⁵ The test for whether an agent entering into a contract on behalf of a principal disclosed his or her representative capacity to the other contracting party is the other party's knowledge, or reasonable grounds to know, of the principal's existence or identity irrespective of the source from which the other party obtains it.⁶ The agent has the burden of proving that he or she disclosed his or her agency status and the identity of his or her principal.⁷ Whether or not an agency relationship has been disclosed, as would allow an agent to avoid individual liability, must be decided on a case-by-case basis.⁸

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Footnotes

- 1 [Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.](#), 630 F.2d 250, 7 Fed. R. Evid. Serv. 725 (5th Cir. 1980) (disclosed principal); [Anderson v. Pods, Inc.](#), 70 A.D.3d 820, 896 N.Y.S.2d 88 (2d Dep't 2010) (disclosed); [Badger State Bank v. Taylor](#), 2004 WI 128, 276 Wis. 2d 312, 688 N.W.2d 439 (2004) (partially disclosed; undisclosed).
[Restatement Third, Agency § 1.04\(2\)](#) (uses designation "unidentified principal" rather than "partially disclosed principal").
- 2 [Manchester Supply Co. v. Dearborn](#), 90 N.H. 447, 10 A.2d 658 (1940).
- 3 [Hohauser v. Schor](#), 101 So. 2d 169 (Fla. 3d DCA 1958).
As to the liability of an agent of an undisclosed principal, generally, see §§ [295](#) to [297](#).
As to the liability of an undisclosed principal, generally, see §§ [290](#) to [294](#).
- 4 [Badger State Bank v. Taylor](#), 2004 WI 128, 276 Wis. 2d 312, 688 N.W.2d 439 (2004).
- 5 [Commercial Coin Laundry Systems v. Enneking](#), 766 N.E.2d 433 (Ind. Ct. App. 2002) (applying Illinois law).
- 6 [Gordon v. Leasman](#), 365 S.W.3d 109 (Tex. App. Houston 1st Dist. 2011).
- 7 [Rodgers v. North Louisiana Amusement & Gaming, L.L.C.](#), 56 So. 3d 289 (La. Ct. App. 2d Cir. 2010), writ denied, 58 So. 3d 481 (La. 2011).
- 8 [George v. White](#), 101 So. 3d 1036 (La. Ct. App. 5th Cir. 2012).

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XIII. Undisclosed Agency

A. In General

§ 288. Alternative liability; election by third person

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The liability of an undisclosed principal and his or her agent is an alternative liability, rather than a joint liability or a joint and several liability, and the third party, after becoming aware of the agency and the identity of the principal, must elect to hold either the agent or the principal liable but not both.¹ In other words, the contractual liability of an agent and principal in such situation is not joint, and after the election to proceed against one, the other cannot be held liable.²

Caution:

In some jurisdictions, the election rule has been eliminated and a creditor who contracts with the agent for an undisclosed principal does not obtain alternative liability but rather may proceed to judgment against both although the creditor is limited to one satisfaction of the judgment.³

Only after discovery of the principal and opportunity to make a deliberate and intelligent choice is the third party in a position to elect whether to hold the principal or the agent responsible in connection with the transaction.⁴ Further, although the third person is required to elect within a reasonable time whether to hold the agent or the principal responsible, the third person is not

required to speculate as to the relationship.⁵ On the other hand, once the third person, with knowledge of all the facts, makes an election, he or she must abide by it.⁶ Such election is ordinarily irrevocable and does not depend upon a satisfaction of the claim.⁷

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Footnotes

- 1 Certain Interested Underwriters at Lloyd's, London, England v. Layne, 26 F.3d 39, 29 Fed. R. Serv. 3d 436, 1994 FED App. 0200P (6th Cir. 1994) (applying Tennessee law); Kingsberry Homes v. Findley, 242 Ga. 362, 249 S.E.2d 51 (1978); Moerbe v. Meece, 630 S.W.2d 278 (Tex. App. Austin 1981), judgment aff'd in part, rev'd in part on other grounds, 631 S.W.2d 729 (Tex. 1982).
- 2 Redi-Floors, Inc. v. Sonenberg Co., 254 Ga. App. 615, 563 S.E.2d 505 (2002).
- 3 § 289.
- 4 Steele-Smith Grocery Co. v. Potthast, 109 Iowa 413, 80 N.W. 517 (1899); Lindquist v. Dickson, 98 Minn. 369, 107 N.W. 958 (1906).
- 5 Hohauser v. Schor, 101 So. 2d 169 (Fla. 3d DCA 1958).
- 6 Wedge v. Security-First Nat. Bank of Los Angeles, 219 Cal. 113, 25 P.2d 411 (1933).
- 7 Fleming v. Dolfen, 214 Cal. 269, 4 P.2d 776, 78 A.L.R. 585 (1931); Bell v. Borders, 205 Ky. 181, 265 S.W. 514 (1924).
As to the satisfaction of the claim by the principal or agent as precluding the liability of the other, see § 289.

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A. In General

§ 289. Alternative liability; election by third person—Suit or judgment as election

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The mere commencement of a suit against the agent¹ or the taking of a judgment against the agent² does not, if the plaintiff was unaware at such time of the existence or the identity of the principal, amount to an election to hold the agent, rather than the principal, liable.

In some jurisdictions, the election rule has been eliminated, and a creditor who contracts with the agent for an undisclosed principal may proceed to judgment against both but is limited to one satisfaction of the judgment.³

In some jurisdictions, however, if the third party, after learning the facts and the identity of the principal, brings suit and recovers judgment against the agent, this is an election against the agent which will bar a subsequent action against the principal.⁴ A judgment against the principal will likewise bar a subsequent action against the agent.⁵ The duty of the plaintiff to elect is waived if the party who holds the right to compel an election fails to demand or move for that remedy prior to judgment.⁶ Moreover, if the trial court did not require that the third party elect to sue either the principal or the agent and made the election for the third party by attributing full liability to the principal or agent, the third party may make the election on appeal.⁷

In any event, if the third person's claim is totally satisfied by either the agent or the principal, the third person has no right to proceed further against the other.⁸

The rule under the Restatement is that when an agent has made a contract with a third party on behalf of a principal, unless the contract provides otherwise, the liability, if any, of the principal or the agent to the third party is not discharged if the third party obtains a judgment against the other.⁹ On the other hand, the liability, if any, of the principal or the agent to the third party is discharged to the extent a judgment against the other is satisfied.¹⁰

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Footnotes

- 1 Mississippi Valley Const. Co. v. Charles T. Abeles & Co., 87 Ark. 374, 112 S.W. 894 (1908); *Estes v. Aaron*, 227 Mass. 96, 116 N.E. 392 (1917); *Dameron v. Quick*, 116 Va. 614, 82 S.E. 709 (1914).
- 2 *Grinder v. Bryans Road Bldg. & Supply Co., Inc.*, 290 Md. 687, 432 A.2d 453 (1981); *Old Ben Coal Co. v. Universal Coal Co.*, 248 Mich. 486, 227 N.W. 794 (1929); *Eckstein v. Caldwell*, 61 R.I. 142, 200 A. 434, 119 A.L.R. 1311 (1938).
- 3 *Grinder v. Bryans Road Bldg. & Supply Co., Inc.*, 290 Md. 687, 432 A.2d 453 (1981); *Engelstad v. Cargill, Inc.*, 336 N.W.2d 284 (Minn. 1983).
- 4 *Pittsburgh Terminal Coal Corporation v. Bennett*, 73 F.2d 387 (C.C.A. 3d Cir. 1934); *Hospelhorn v. Poe*, 174 Md. 242, 198 A. 582, 118 A.L.R. 682 (1938); *Sherrill v. Bruce Advertising, Inc.*, 538 S.W.2d 865 (Tex. Civ. App. Houston 14th Dist. 1976).
- 5 *Murphy v. Hutchinson*, 93 Miss. 643, 48 So. 178 (1909); *Newark Paraffine Paper Co. v. Dugan*, 162 N.J. Super. 575, 394 A.2d 114 (App. Div. 1978).
- 6 *Davis v. Childers*, 381 So. 2d 200 (Ala. Civ. App. 1979), writ denied, 381 So. 2d 202 (Ala. 1980); *Amortibanc Inv. Co., Inc. v. Rampart Associated Management, Inc.*, 6 Kan. App. 2d 227, 627 P.2d 389 (1981); *Hoyt v. Horst*, 105 N.H. 380, 201 A.2d 118 (1964).
- 7 *N. K. Parrish, Inc. v. Southwest Beef Industries Corp.*, 638 F.2d 1366 (5th Cir. 1981) (applying Texas law).
- 8 *Davis v. Childers*, 381 So. 2d 200 (Ala. Civ. App. 1979), writ denied, 381 So. 2d 202 (Ala. 1980); *Grinder v. Bryans Road Bldg. & Supply Co., Inc.*, 290 Md. 687, 432 A.2d 453 (1981); *Engelstad v. Cargill, Inc.*, 336 N.W.2d 284 (Minn. 1983).
As to the discharge of a disclosed or partially disclosed principal upon the agent's satisfaction of the claim, see § 315.
- 9 Restatement Third, Agency § 6.09(1).
- 10 Restatement Third, Agency § 6.09(2).

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B. Liability of Principal

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3 Am. Jur. 2d Agency § 290

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XIII. Undisclosed Agency

B. Liability of Principal

§ 290. Generally

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West's Key Number Digest

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The rule that a principal is liable for the acts of an agent within the scope of the agent's authority applies to an undisclosed as well as to a disclosed principal,¹ and the fact that an agent acts in his or her own name without disclosing the principal does not preclude liability of the principal when discovered to be such by the third party.²

Practice Tip:

Extrinsic evidence is admissible to identify an undisclosed principal.³

In other words, an agent may make a contract for an undisclosed principal in his or her own name, and the latter may sue or be sued on the contract.⁴ This is true even when an agent signs a written agreement for the transfer of real property without disclosing his or her agency status.⁵

Generally, an undisclosed principal, when the fact of the agency and his or her identity are subsequently discovered, may, at the election of the third party exercised within a reasonable time,⁶ be held liable upon all simple nonnegotiable contracts made

in his or her behalf by an authorized agent even though the contract was made by the authorized agent without the principal's knowledge.⁷

Actual authority can bind both disclosed and undisclosed principals,⁸ but in the absence of proof of an actual agency relationship, there can be no reliance on the doctrine imposing liability on an undisclosed principal.⁹

On the other hand, the principal is not liable where the contract provides that an undisclosed principal is not a party to it¹⁰ or where it clearly appears that the contracting party intended to give exclusive credit to the agent, irrespective of the existence or liability of the undisclosed principal.¹¹ Nor is the principal liable where the principal and the agent have so adjusted their accounts that to hold the principal liable would work an injustice to him or her.¹²

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Footnotes

- 1 U.S. v. Everett Monte Cristo Hotel, Inc., 524 F.2d 127 (9th Cir. 1975); Toll v. Pioneer Sample Book Co., 373 Pa. 127, 94 A.2d 764 (1953); Wasatch Oil & Gas, L.L.C. v. Reott, 2007 UT App 223, 163 P.3d 713 (Utah Ct. App. 2007).
A representation by an agent made incident to a contract or conveyance is attributed to an undisclosed principal as if the principal made the representation directly when the agent acted with actual authority in making the representation, or the agent acted without actual authority in making the representation but had actual authority to make true representations about the same matter. *Restatement Third, Agency* § 6.11(3). If excluded by the contract, an undisclosed principal is not a party to the contract made by his or her agent. *Restatement Third, Agency* § 6.03(1).
- 2 Lee v. YES of Russellville, Inc., 784 So. 2d 1022 (Ala. 2000); Nichols v. Arthur Murray, Inc., 248 Cal. App. 2d 610, 56 Cal. Rptr. 728 (4th Dist. 1967); E. M. Workman Co. v. Harrison, 3 Conn. Cir. Ct. 557, 221 A.2d 276 (App. Div. 1966).
- 3 Sterling v. Taylor, 40 Cal. 4th 757, 55 Cal. Rptr. 3d 116, 152 P.3d 420 (2007).
- 4 First Nat. Acceptance Co. v. Bishop, 187 S.W.3d 710 (Tex. App. Corpus Christi 2006).
- 5 Wasatch Oil & Gas, L.L.C. v. Reott, 2007 UT App 223, 163 P.3d 713 (Utah Ct. App. 2007).
- 6 § 288.
- 7 York Co. v. Central R.R., 70 U.S. 107, 18 L. Ed. 170, 1865 WL 10727 (1865); N. K. Parrish, Inc. v. Southwest Beef Industries Corp., 638 F.2d 1366 (5th Cir. 1981) (applying Texas law); Nalbandian v. Hanson Restaurant & Lounge, Inc., 369 Mass. 150, 338 N.E.2d 335 (1975).
- 8 Soultz Farms, Inc. v. Schafer, 797 N.W.2d 92, 74 U.C.C. Rep. Serv. 2d 619 (Iowa 2011).
- 9 Associated Creditors' Agency v. Davis, 13 Cal. 3d 374, 118 Cal. Rptr. 772, 530 P.2d 1084 (1975).
- 10 Rochell v. Moore-Handley Hardware Co., 29 Ala. App. 315, 196 So. 141 (1940); Raymond S. Roberts, Inc. v. White, 117 Vt. 573, 97 A.2d 245 (1953).
- 11 § 291.
- 12 Rochell v. Moore-Handley Hardware Co., 29 Ala. App. 315, 196 So. 141 (1940).

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B. Liability of Principal

§ 291. Where exclusive credit is extended to agent

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The general rule that an act or contract of a duly authorized agent who fails to disclose the principal may bind such principal does not apply if it clearly appears that the contracting party intended to give exclusive credit to the agent, irrespective of the existence or possible liability of an undisclosed principal.¹

As to what will amount to giving such exclusive credit to the agent, the mere fact that the third person has relied solely on the agent's credit before discovering the principal does not preclude the third person, upon discovering the principal, from resorting to the principal for the performance of the contract entered into by the agent.² Also, the fact that a seller takes the personal note or bill drawn by the agent of an undisclosed principal does not conclusively prove that the seller relied solely on the personal credit of the agent so as to prevent the seller's holding the principal liable for the price.³

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- ¹ [Ford v. Williams](#), 62 U.S. 287, 21 How. 287, 16 L. Ed. 36, 1858 WL 9383 (1858); [Kingsberry Homes v. Findley](#), 242 Ga. 362, 249 S.E.2d 51 (1978); [Raymond S. Roberts, Inc. v. White](#), 117 Vt. 573, 97 A.2d 245 (1953).
- ² [Ford v. Williams](#), 62 U.S. 287, 21 How. 287, 16 L. Ed. 36, 1858 WL 9383 (1858).
- ³ [Merrill v. Kenyon](#), 48 Conn. 314, 1880 WL 2325 (1880).

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§ 292. Unauthorized acts and contracts

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The rule permitting suit against the undisclosed principal does not apply where the agent was not given any authority to act, and it is not shown that the principal allowed the agent to do so or had reason to suppose that the agent was acting outside of the authority given.¹ Apart from statute, an undisclosed principal who entrusts an agent with the possession of a chattel, other than a commercial document representing a chattel or chose in action, but who does not authorize the agent to sell it, display it for sale, or otherwise affect the principal's interest in it, is not thereby bound by a transaction with respect to the chattel between the agent and a third person who believes the agent to be the owner.² However, an undisclosed principal may be liable for a contract made by an agent even when the agent acts without authority where the principal retains the benefits of the transaction.³ Moreover, although a special agent may generally not bind an undisclosed principal by unauthorized contracts,⁴ a general agent or manager may subject the principal to liability for acts done contrary to instructions where the acts are usual or necessary in such a transaction.⁵

Under the Third Restatement of Agency, an undisclosed principal is subject to liability to a third party who is justifiably induced to make a detrimental change in position by an agent acting on the principal's behalf and without actual authority if the principal, having notice of the agent's conduct and that it might induce others to change their positions, did not take reasonable steps to notify them of the facts.⁶ Furthermore, an undisclosed principal may not rely on instructions given an agent that qualify or reduce the agent's authority to less than the authority a third party would reasonably believe the agent to have under the same circumstances if the principal had been disclosed.⁷

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Footnotes

- 1 Murphy v. Barnard, 162 Mass. 72, 38 N.E. 29 (1894).
- 2 Lux Art Van Service, Inc. v. Pollard, 344 F.2d 883 (9th Cir. 1965).
- 3 N. K. Parrish, Inc. v. Southwest Beef Industries Corp., 638 F.2d 1366 (5th Cir. 1981) (applying Texas law).
- 4 Rowen & Blair Elec. Co. v. Flushing Operating Corp., 66 Mich. App. 480, 239 N.W.2d 633 (1976), judgment
aff'd, 399 Mich. 593, 250 N.W.2d 481 (1977).
- 5 Holman-O. D. Baker Co. v. Pre-Design, Inc., 104 N.H. 116, 179 A.2d 454 (1962); Dotson v. Grice, 98 N.M.
207, 647 P.2d 409 (1982).
- 6 Restatement Third, Agency § 2.06(1).
- 7 Restatement Third, Agency § 2.06(2).

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B. Liability of Principal

§ 293. Where contract is negotiated by principal in agent's name

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A principal who, for the purpose of transacting business, adopts an assumed name, or the name of another or of the agent, is bound by the contract made in that name.¹ The admission of parol evidence identifying the principal as the real party in interest violates to no greater extent the rule against varying written contracts by extrinsic evidence than subjecting to liability an unknown and unnamed principal by similar means.²

CUMULATIVE SUPPLEMENT

Cases:

Where the contract is made with the agent as such but in such form as to appear to be made with him personally, the other party is bound to the agent, though his recovery is, of course, ordinarily for the benefit of his principal; therefore, in general, where a contract, whether written or unwritten, entered into on account of the principal, is, in its terms, made with the agent personally, the agent may sue upon it at law. [Tingler v. Graystone Homes, Inc.](#), 834 S.E.2d 244 (Va. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 Love v. Brown Development Co. of Michigan, 100 Fla. 1373, 131 So. 144 (1930); Hartman v. Thompson, 104 Md. 389, 65 A. 117 (1906); Hutchison Lumber Co. v. Lewis, 1923 OK 203, 89 Okla. 145, 214 P. 721 (1923).
- 2 Moore v. Consolidated Products Co., 10 F.2d 319 (C.C.A. 8th Cir. 1925); Love v. Brown Development Co. of Michigan, 100 Fla. 1373, 131 So. 144 (1930); Martin v. Bos Lines, Inc., 205 Kan. 532, 470 P.2d 737 (1970).

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§ 294. Effect of principal's payment to, or settlement with, agent

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[Principal's payment to or settlement with agent as affecting former's liability to third person with respect to contract negotiated by agent, 71 A.L.R.2d 911](#)

According to some courts, an undisclosed principal otherwise liable on the contracts of an agent is relieved of liability to a third party by payment in good faith to the agent prior to election by the third party to hold the principal responsible, at least where the third party was, prior to disclosure, in ignorance of the existence of any agency and relied on the agent's credit under the belief that the agent was the principal.¹ According to other courts, an undisclosed principal may be found liable to a third party after discovery, despite payment in good faith to the agent before notice of the third party's election to hold the principal responsible, in the absence of misleading conduct by the third party leading the principal to settle with the agent.²

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Footnotes

- ¹ [Rochell v. Moore-Handley Hardware Co., 29 Ala. App. 315, 196 So. 141 \(1940\); Beacham v. Coe-Mortimer Co., 30 Ga. App. 456, 118 S.E. 441 \(1923\).](#)

2 [Poretta v. Superior Dowel Co.](#), 153 Me. 308, 137 A.2d 361, 71 A.L.R.2d 898 (1957); [A. Gay Jenson Farms Co. v. Cargill, Inc.](#), 309 N.W.2d 285 (Minn. 1981); [Simmons Hardware Co. v. Todd](#), 79 Miss. 163, 29 So. 851 (1901).

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C. Liability of Agent

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Forms

Forms relating to liability of agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

One who, as an agent for another, enters into a contract with a third party without disclosing his or her agent status, or discloses his or her agent status without disclosing the identity of his or her principal, generally can be held liable on the contract at the third party's election.¹ In such case, the agent is subject to all the liabilities, express or implied, created by the contract in the same manner as if the agent were the principal in interest.²

After the principal is disclosed, however, the agent is not liable for subsequent authorized acts or for the subsequent dealings between the third person and the principal.³

Under the Restatement Third of Agency, when an agent acting with actual authority makes a contract on behalf of an undisclosed principal, the agent and the third party are parties to the contract.⁴

CUMULATIVE SUPPLEMENT

Cases:

An agent is liable on a contract when his agency and principal are undisclosed. [Agrisource, Inc. v. Johnson](#), 332 P.3d 815 (Idaho 2014).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Odyssey Travel Center, Inc. v. RO Cruises, Inc.](#), 262 F. Supp. 2d 618 (D. Md. 2003) (applying Maryland law); [Action Concrete, Inc. v. Focal Point Engineering, Inc.](#), 296 Ga. App. 567, 675 S.E.2d 303 (2009); [Mays v. Hodges](#), 271 S.W.3d 607 (Mo. Ct. App. S.D. 2008).
- 2 [Mawer-Gulden-Annis, Inc. v. Brazilian & Colombian Coffee Co.](#), 49 Ill. App. 2d 400, 199 N.E.2d 222 (1st Dist. 1964); [Kelly v. Guess](#), 157 Miss. 157, 127 So. 274 (1929); [Norswing v. Lakeland Flying Service](#), 193 Or. 91, 237 P.2d 586 (1951).
- 3 [Potter v. Chaney](#), 290 S.W.2d 44 (Ky. 1956); [Wahab Janitorial Services v. P.M. Group Mgt.](#), 161 Ohio App. 3d 632, 2005-Ohio-3037, 831 N.E.2d 522 (1st Dist. Hamilton County 2005); [Brackenridge v. Claridge](#), 91 Tex. 527, 44 S.W. 819 (1898).
- 4 [Restatement Third, Agency § 6.03\(2\)](#).

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3 Am. Jur. 2d Agency § 296

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Agency

John Bourdeau, J.D., Romualdo P. Eclavea, J.D., Jill Gustafson, J.D., and Lucas Martin, J.D.

XIII. Undisclosed Agency

C. Liability of Agent

§ 296. What constitutes disclosure to, or knowledge of, third person as to relieve agent of liability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  146(1) to 146(3)

In order for an agent to avoid personal liability on a contract negotiated on the principal's behalf, the agent must disclose not only that he or she is an agent but also the identity of the principal.¹ The use of a trade name is not necessarily a sufficient disclosure of the identity of the principal and the fact of agency so as to protect the agent against personal liability.² Thus, an undertaking by an individual using a trade name is still the obligation of the individual.³ Likewise, the agent's use of corporate checks is not necessarily sufficient to notify the third person of the existence of a corporate principal⁴ although there is authority to the contrary.⁵

Where information upon the face of the contract is sufficient to disclose to a reasonable person the identity of the principal, the principal, and not the agent, is liable.⁶ Moreover, where the other party has actual knowledge of the agency and the identity of the principal, the agent will be relieved from liability⁷ whether the agent makes the disclosure, or the other party acquires the knowledge from some other source.⁸

Observation:

The third party does not have a duty to investigate, to seek actual knowledge of the identity of the principal, or to avoid liability on a contract.⁹ In fact, a third party's ability to discover the name of an undisclosed principal may be insufficient to discharge an agent's liability.¹⁰ Then again, the party will have sufficient notice of the principal if the agent has given such information that a reasonable person in the light of the surrounding circumstances would have understood that the agent was acting for the principal indicated.¹¹

In order to protect the agent from personal liability, it is essential that the principal be disclosed to the third person at the time the transaction is being conducted;¹² knowledge of the real position of affairs acquired after a cause of action has accrued cannot affect the right to recover from the agent personally on a contract.¹³

The disclosure by the agent of the fact of the agency and the name of the principal may be proved by direct evidence or by the circumstances surrounding the transaction and the course of dealing between the parties.¹⁴

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Footnotes

- 1 Nash v. Towne, 72 U.S. 689, 18 L. Ed. 527, 1866 WL 9392 (1866); K & S Services, Inc. v. The Schulz Elec. Group of Companies, 670 F. Supp. 2d 91 (D. Me. 2009) (applying Maine law); In re Montagne, 431 B.R. 94, 72 U.C.C. Rep. Serv. 2d 485 (Bankr. D. Vt. 2010) (applying Vermont law); Central Missouri Professional Services, Inc. v. Shoemaker, 108 S.W.3d 6 (Mo. Ct. App. W.D. 2003).
When an agent acting with actual or apparent authority makes a contract on behalf of an unidentified principal, the agent is a party to the contract unless the agent and the third party agree otherwise. Restatement Third, Agency § 6.02(2).
- 2 Myers-Leiber Sign Co. v. Weirich, 2 Ariz. App. 534, 410 P.2d 491 (1966); W. W. Leasing Unlimited v. Commercial Standard Title Ins. Co., 149 Cal. App. 3d 792, 197 Cal. Rptr. 118 (1st Dist. 1983); Pappas v. Criss, 296 Ga. App. 803, 676 S.E.2d 21 (2009).
- 3 Yim v. J's Fashion Accessories, Inc., 298 Ga. App. 399, 680 S.E.2d 466 (2009).
- 4 Jensen v. Alaska Valuation Service, Inc., 688 P.2d 161 (Alaska 1984).
- 5 Potter v. Chaney, 290 S.W.2d 44 (Ky. 1956).
- 6 Valkenburg, K.-G. v. The Henry Denny, 295 F.2d 330 (7th Cir. 1961) (bill of lading).
- 7 Babul v. Golden Fuel, Inc., 990 So. 2d 680 (Fla. 2d DCA 2008); American Bank and Trust Co. of Coshutta v. Boggs and Thompson, 821 So. 2d 585 (La. Ct. App. 2d Cir. 2002), writ denied, 827 So. 2d 1175 (La. 2002); Treadwell v. J.D. Const. Co., 2007 ME 150, 938 A.2d 794 (Me. 2007).
- 8 Lentz Plumbing Co. v. Fee, 235 Kan. 266, 679 P.2d 736 (1984); Gordon v. Leasman, 365 S.W.3d 109 (Tex. App. Houston 1st Dist. 2011).
- 9 Treadwell v. J.D. Const. Co., 2007 ME 150, 938 A.2d 794 (Me. 2007).
- 10 Central Missouri Professional Services, Inc. v. Shoemaker, 108 S.W.3d 6 (Mo. Ct. App. W.D. 2003).
- 11 Deutsche Bank Securities, Inc. v. Rhodes, 578 F. Supp. 2d 652 (S.D. N.Y. 2008) (applying New York law).
- 12 Deutsche Bank Securities, Inc. v. Rhodes, 578 F. Supp. 2d 652 (S.D. N.Y. 2008) (applying New York law); Jensen v. Alaska Valuation Service, Inc., 688 P.2d 161 (Alaska 1984); Central Missouri Professional Services, Inc. v. Shoemaker, 108 S.W.3d 6 (Mo. Ct. App. W.D. 2003).
- 13 Lake v. Premier Transp., 246 S.W.3d 167 (Tex. App. Tyler 2007).
- 14 Lentz Plumbing Co. v. Fee, 235 Kan. 266, 679 P.2d 736 (1984); Willamette Tug & Barge Co. v. Commercial Dispatching Corp., 180 Or. 657, 178 P.2d 698 (1947); Hurricane Milling Co. v. Steel & Payne Co., 84 W. Va. 376, 99 S.E. 490, 6 A.L.R. 637 (1919).
As to disclosure of the agency as a question of fact, see § 334.

3 Am. Jur. 2d Agency § 297

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XIII. Undisclosed Agency

C. Liability of Agent

§ 297. Who may hold agent liable

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  146(1) to 146(3)

In order that one may hold liable an agent who contracts for an undisclosed principal, he or she must be privy to such contract; a stranger to a contract cannot rely on the rule that one who contracts for an undisclosed principal is bound.¹ For example, one assuming on behalf of an undisclosed principal the payment of a mortgage may show the fact of his or her personal nonliability as against the mortgagee who was not a party to the contract.²

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Footnotes

¹ [Nissen v. Sabin, 202 Iowa 1362, 212 N.W. 125, 50 A.L.R. 1216 \(1927\).](#)

² [Nissen v. Sabin, 202 Iowa 1362, 212 N.W. 125, 50 A.L.R. 1216 \(1927\).](#)

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3 Am. Jur. 2d Agency XIII D Refs.

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Research References

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  142, 144, 183(2)

A.L.R. Library

A.L.R. Index, Agency

A.L.R. Index, Undisclosed Principal

West's A.L.R. Digest, [Principal and Agent](#)  142, 144, 183(2)

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3 Am. Jur. 2d Agency § 298

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D. Liability of Third Person

§ 298. Generally; liability to principal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  142, 183(2)

A.L.R. Library

[Agency: anti-assignment clause in contract as precluding enforcement by undisclosed principal, 75 A.L.R.3d 1184](#)

When an agent makes a contract for the principal, but, contracting as if he or she were the principal, conceals the fact that he or she is an agent, the principal may at any time appear as such and claim all the benefits of the contract from the other contracting party so far as the principal can do so without injury to the other party by the substitution of him- or herself for the agent.¹ In short, a principal has standing to sue on a contract entered into by his or her agent on his or her behalf.² However, a third person does not become liable to an undisclosed principal on a contract where the specific terms of the contract, or the circumstances under which it is made, exclude liability to any undisclosed principal or to the particular principal.³ Likewise, because every person has the right to elect with what parties he or she will deal, where the agent not only fails to disclose the principal but also expressly represents that there is no principal because the agent knows that the third person, for personal reasons, would not deal with the principal, the third person, upon timely discovery of the agency, may withdraw from or rescind the transaction.⁴

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Footnotes

- 1 Ford v. Williams, 62 U.S. 287, 21 How. 287, 16 L. Ed. 36, 1858 WL 9383 (1858); Lighting Fixture & Elec.
Supply Co. v. Continental Ins. Co., 420 F.2d 1211 (5th Cir. 1969) (applying Florida law); Brunswick Leasing
Corp. v. Wisconsin Cent., Ltd., 136 F.3d 521, 39 Fed. R. Serv. 3d 729 (7th Cir. 1998); Woodlawn Park Ltd.
Partnership v. Doster Const. Co., Inc., 623 So. 2d 645 (La. 1993).
Restatement Third, Agency § 6.03.
- 2 IMG Fragrance Brands, LLC v. Houbigant, Inc., 759 F. Supp. 2d 363 (S.D. N.Y. 2010) (applying New York
law); Sharma v. Vinmar Intern., Ltd., 231 S.W.3d 405 (Tex. App. Houston 14th Dist. 2007).
- 3 Nance, Inc. v. Winebarger, 32 Tenn. App. 229, 222 S.W.2d 231 (1949).
- 4 Heart of America Lumber Co. v. Belove, 111 F.2d 535, 130 A.L.R. 658 (C.C.A. 8th Cir. 1940); Daniel Boone
Complex, Inc. v. Furst, 43 N.C. App. 95, 258 S.E.2d 379 (1979); Hirsch v. Silberstein, 424 Pa. 486, 227
A.2d 638 (1967).
As to the liability of a third person where the contract involves trust or confidence in, or performance by,
the agent personally, see § 299.
As to the liability of a third person where the contract is made for benefit of others as well as the undisclosed
principal, see § 300.
As to the defenses, setoffs, and counterclaims available to the third person, see § 309.

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3 Am. Jur. 2d Agency § 299

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XIII. Undisclosed Agency

D. Liability of Third Person

§ 299. Generally; liability to principal—Contracts involving trust or confidence in, or performance by, agent personally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  142

A.L.R. Library

[Agency: anti-assignment clause in contract as precluding enforcement by undisclosed principal, 75 A.L.R.3d 1184](#)

If the contract made by an agent acting for an undisclosed principal involves elements of personal trust and confidence as a consideration moving from the agent, contracting in his or her own name, to the other party to the contract, the principal, while the contract remains executory, cannot, against the resistance of the other party, enforce it either to compel performance by the other party or to recover damages for a breach.¹ An intention to make the personality of one of the parties an essential or material part of the contract may be inferred, as for example, by a refusal to deal with any other individual of the same class, by the terms of the contract, or merely by circumstances even though an exclusion of the principal will not ordinarily be presumed.²

Acts done or offered to be done by an undisclosed principal, which, if performed by a person other than the agent, are not substantially those which the contract contemplates, are not effective as a performance or as a tender of performance of the contract.³ Thus, an undisclosed principal cannot enforce, against the purchaser, a contract made with his or her duly authorized agent to purchase land where it contains the agent's personal covenant to warrant title.⁴ Similarly, a principal cannot enforce a guaranty addressed to an agent where nothing in the guaranty indicates that the agent was acting for an undisclosed principal, and the guarantor had no knowledge that the credit was to be extended by the principal.⁵

On the other hand, where a contract made by a third party in consideration of the personal character, ability, or skill of the agent has been fully performed by the latter, or if performance by the principal has been accepted, the undisclosed principal is entitled to enforce, by an action against the third party, the third party's performance of his or her part of the contract.⁶

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Footnotes

- 1 [Upchurch v. Goodroe](#), 242 Ala. 395, 6 So. 2d 869 (1942); [Arnold's of Miss., Inc. v. Clancy](#), 251 Miss. 613, 171 So. 2d 152 (1965); [Franklin Fire Ins. Co. v. Shadid](#), 68 S.W.2d 1030 (Tex. Comm'n App. 1934).
- 2 [Nance, Inc. v. Winebarger](#), 32 Tenn. App. 229, 222 S.W.2d 231 (1949).
- 3 [Pancoast v. Dinsmore](#), 105 Me. 471, 75 A. 43 (1909).
An undisclosed principal does not become a party to a contract if the contract excludes the principal. An explicit exclusion limits the third party's manifestation of assent to be bound. Furthermore, the nature of the performance that a contract requires from a third party determines whether an undisclosed principal is entitled to receive that performance. An undisclosed principal may not require that a third party render performance to the principal if rendering performance to the principal would materially change the nature of the third party's duty, materially increase the burden or risk imposed on the third party, or materially impair the third party's chance of receiving return performance. [Restatement Third, Agency § 6.03](#), comment d.
- 4 [Birmingham Matinee Club v. McCarty](#), 152 Ala. 571, 44 So. 642 (1907).
- 5 [Am. Jur. 2d, Guaranty § 21](#).
- 6 [Sullivan v. Shailor](#), 70 Conn. 733, 40 A. 1054 (1898); [Warder v. White](#), 14 Ill. App. 50, 1883 WL 10578 (1st Dist. 1883).

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3 Am. Jur. 2d Agency § 300

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XIII. Undisclosed Agency

D. Liability of Third Person

§ 300. Generally; liability to principal—Contract made for benefit of others as well as undisclosed principal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 🔑 142

In cases involving actions for breach of contract, an undisclosed principal may maintain an action against one who has contracted with the agent only when he or she has the entire beneficial interest under the contract or when the contract is severable and equivalent to a series of separate and distinct contracts; when the principal is not the sole party in interest, he or she may not maintain suit.¹ Accordingly, an undisclosed principal has no right to sue on a contract made by an agent for the benefit of that principal and other undisclosed principals where the contract is not severable but consists of orders given by the several principals and lumped together by the agent in making the contract.²

Under the Restatement Third of Agency, two or more principals may authorize the same agent to make separate contracts for them. If, however, the agent makes a single contract with a third party on the principals' behalfs that combines the principals' separate orders or interests and calls for a single performance by the third party, and if the principals are unidentified or undisclosed, the third party and the agent are the only parties to the combined contract.³ What is more, unless the agent acted with actual or apparent authority to bind each of the principals to the combined contract, the third party is not subject to liability on the combined contract to any of the separate principals.⁴

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Footnotes

- ¹ [H. Midwood's Sons Co. v. Alaska-Portland Packers' Ass'n](#), 28 R.I. 303, 67 A. 61 (1907).
- ² [H. Midwood's Sons Co. v. Alaska-Portland Packers' Ass'n](#), 28 R.I. 303, 67 A. 61 (1907).
- ³ [Restatement Third, Agency § 6.05\(2\)\(b\)](#).

4 [Restatement Third, Agency § 6.05\(2\)\(c\).](#)

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D. Liability of Third Person

§ 301. Liability to agent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  142, 144

An agent who contracts in his or her own name for an undisclosed principal is a party to the contract despite the agency, and because the agent thus becomes personally liable on the contract,¹ he or she has the corresponding right to enforce it,² at least if the principal does not object.³

Accordingly, if a sale is made by an agent in his or her own name, the agent may sue for the price if the principal interposes no objection.⁴ Where a purchase is made by an agent for an undisclosed principal, the agent may ordinarily sue in his or her own name to enforce the contract.⁵ Similarly, an agent in charge of the goods of an undisclosed principal who makes a contract with a common carrier to ship such goods may maintain an action in his or her own name for a breach of such contract.⁶ Likewise, an agent who by mistake pays to a third party money belonging to the undisclosed principal may maintain in his or her own name an action for money had and received to recover it.⁷

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Footnotes

- ¹ § 295.
- ² *Kavanaugh v. Ealy*, 364 S.W.3d 759 (Mo. Ct. App. E.D. 2012).
- ³ *Albany & Rensselaer Iron & Steel Co. v. Lundberg*, 121 U.S. 451, 7 S. Ct. 958, 30 L. Ed. 982 (1887); *Lake Shore Management Co. v. Blum*, 92 Ill. App. 2d 47, 235 N.E.2d 366 (1st Dist. 1968) (partially disclosed principal); *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996).
As to the right of an agent who is a party promisee to sue the third person in his or her own name, generally, see § 313.
- ⁴ *Camp v. Barber*, 87 Vt. 235, 88 A. 812 (1913).

- 5 [Shelby v. Burrow](#), 76 Ark. 558, 89 S.W. 464 (1905).
6 [Carter v. Southern Ry. Co.](#), 111 Ga. 38, 36 S.E. 308 (1900).
7 [Parks v. Fogleman](#), 97 Minn. 157, 105 N.W. 560 (1906).
 As to the defenses available to the third person, see [§ 314](#).

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3 Am. Jur. 2d Agency XIV A Refs.

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XIV. Practice and Procedure

A. Actions and Remedies, in General

[Topic Summary](#) | [Correlation Table](#)

Research References


West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  78(.5) to 78(2.1), 79(.5) to 79(3), 89(.5) to 89(4.5), 90(1), 90(2), 183(.5) to 183(5), 184(.5) to 186, 188

A.L.R. Library

A.L.R. Index, Agency

A.L.R. Index, Limitation of Actions

West's A.L.R. Digest, [Principal and Agent](#)  78(.5) to 78(2.1), 79(.5) to 79(3), 89(.5) to 89(4.5), 90(1), 90(2), 183(.5) to 183(5), 184(.5) to 186, 188

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3 Am. Jur. 2d Agency § 302

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XIV. Practice and Procedure

A. Actions and Remedies, in General

1. Actions and Remedies of Principal

a. Against Agent

§ 302. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  [79\(.5\) to 79\(3\)](#), [183\(.5\) to 183\(5\)](#), [184\(.5\)](#), [188](#)

A.L.R. Library

[Right of Principal to Recover Punitive Damages for Agent's or Broker's Breach of Duty](#), 46 A.L.R.6th 185

[Rights and remedies where broker or agent, employed to purchase personal property, buys it for himself](#), 20 A.L.R.2d 1140

Forms

Forms relating to improper performance of duties by agent, see Am. Jur. Pleading and Practice Forms, Agency[[Westlaw® Search Query](#)]

A principal whose agent has violated or threatened to violate his or her duties has an appropriate action or remedy, such as an action on the contract of service for a breach or failure to perform it,¹ an action to recover damages for a tort of the agent causing damage to the principal,² or an action for money or property of the principal had and received by the agent.³ Where a

breach of the contract with the principal also constitutes a tort, the principal may elect to sue either for the breach of the agency contract or for the tort.⁴ Likewise, when an agent acts negligently so as to cause its principal to become liable to a third person, the principal may bring an action against the agent either in tort or for breach of contract.⁵ A claim for the breach of an agent's duty of loyalty may also sound both in tort and in contract.⁶

Equitable remedies are available to the principal against the agent, such as an action to establish a constructive trust,⁷ an action for injunctive relief,⁸ an action for an accounting,⁹ and rescission of the agency agreement.¹⁰

An agent is liable to the principal for any loss occasioned by its breach of duty.¹¹ Thus, the principal is entitled to recover payments which, except for the agent's breach of duty, would not have been made to third parties.¹² However, the mere creation of an agency relationship does not establish the agent's responsibility for emotional distress caused to the principal as a result of a breach of the agency contract.¹³

Where an agent breaches a duty to the principal and profits from the breach, the principal may maintain an action to recover those profits for him- or herself.¹⁴

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Footnotes

- 1 [Cutcliffe v. Chesnut](#), 122 Ga. App. 195, 176 S.E.2d 607 (1970); [Ray v. Winter](#), 67 Ill. 2d 296, 10 Ill. Dec. 225, 367 N.E.2d 678 (1977); [Donahue v. Rattikin Title Co.](#), 534 S.W.2d 156 (Tex. Civ. App. Fort Worth 1976). Restatement Third, Agency § 8.01, comment d.
- 2 [Wiley v. Mayer](#), 876 P.2d 1260, 23 U.C.C. Rep. Serv. 2d 1003 (Colo. 1994); [Rockefeller v. Grabow](#), 136 Idaho 637, 39 P.3d 577 (2001); [Lewis-Williamson v. Grange Mut. Ins. Co.](#), 179 Or. App. 491, 39 P.3d 947 (2002) (negligence). Restatement Third, Agency § 8.01, comment d (punitive damages).
- 3 § 304.
- 4 [Dubuque Fire & Marine Ins. Co. v. Wilson](#), 213 F.2d 115 (4th Cir. 1954); [Hoffman v. Insurance Co. of North America](#), 241 Ga. 328, 245 S.E.2d 287 (1978); [Carr v. Peerless Ins. Co.](#), 168 Vt. 465, 724 A.2d 454 (1998).
- 5 [Home Ins. Co. v. Crawford & Co.](#), 890 So. 2d 1186 (Fla. 4th DCA 2005) (abrogated on other grounds by, [Westgate Miami Beach, LTD. v. Newport Operating Corp.](#), 55 So. 3d 567 (Fla. 2010)).
- 6 [Burbank Grease Services, LLC v. Sokolowski](#), 2006 WI 103, 294 Wis. 2d 274, 717 N.W.2d 781 (2006).
- 7 [Buchanan v. Brentwood Federal Sav. and Loan Ass'n](#), 457 Pa. 135, 320 A.2d 117 (1974).
- 8 [Davis v. Jointless Fire Brick Co.](#), 300 F. 1 (C.C.A. 9th Cir. 1924). Restatement Third, Agency § 8.01, comment d (injunction based on breach of fiduciary duty).
- 9 § 303.
- 10 [Cutcliffe v. Chesnut](#), 122 Ga. App. 195, 176 S.E.2d 607 (1970).
- 11 [Amen v. Merced County Title Co.](#), 58 Cal. 2d 528, 25 Cal. Rptr. 65, 375 P.2d 33 (1962); [Cogan v. Kidder, Mathews & Segner, Inc.](#), 97 Wash. 2d 658, 648 P.2d 875 (1982). Restatement Third, Agency § 8.01, comment d.
- 12 [Dubern v. Girard Trust Bank](#), 454 F.2d 565 (3d Cir. 1972).
- 13 [Hatfield v. Max Rouse & Sons Northwest](#), 100 Idaho 840, 606 P.2d 944 (1980).
- 14 [Green v. H & R Block, Inc.](#), 355 Md. 488, 735 A.2d 1039 (1999).

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3 Am. Jur. 2d Agency § 303

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Agency

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XIV. Practice and Procedure

A. Actions and Remedies, in General

1. Actions and Remedies of Principal

a. Against Agent

§ 303. Action for accounting or for breach of duty to account

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  78(.5) to 78(2)

A.L.R. Library

[Availability of equitable remedy of accounting between principal and agent, 3 A.L.R.2d 1310](#)

Forms

Forms relating to accounting, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

The equitable remedy of an action for an accounting is available in favor of a principal when, and only when, the nature of the agency transactions to be accounted for involve fiduciary features, in addition to the existence of the bare relationship of principal and agent.¹ The remedy of accounting may also be available where there are mutual accounts² or where the accounts are of a complicated nature.³

An action for an accounting against an agent who fraudulently used the principal's funds to make a secret profit is not barred by laches where the agent's fraud prevented the principal from learning the facts and where the agent is not harmed by the delay.⁴ However, the equitable remedy of accounting is not available where the principal claimed that the agent had misappropriated funds, but the records were all in the possession of the principal.⁵

It is not necessary that the agent be sued in equity for an accounting but rather may be sued at law upon the obligation.⁶

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Footnotes

- 1 [Dillman v. Hastings](#), 144 U.S. 136, 12 S. Ct. 662, 36 L. Ed. 378 (1892); [Bradshaw v. Thompson](#), 454 F.2d 75, 15 Fed. R. Serv. 2d 1438, 10 U.C.C. Rep. Serv. 641 (6th Cir. 1972); [Silber v. Clarence Rainess & Co.](#), 34 A.D.2d 188, 310 N.Y.S.2d 179 (1st Dep't 1970), [order aff'd](#), 28 N.Y.2d 612, 320 N.Y.S.2d 74, 268 N.E.2d 802 (1971).
[Restatement Third, Agency § 8.01, comment d.](#)
- 2 [Hyatt v. International Agr. Corporation](#), 230 Ala. 153, 160 So. 227 (1935); [Coffin v. Craig](#), 89 Minn. 226, 94 N.W. 680 (1903).
- 3 [Kilbourn v. Sunderland](#), 130 U.S. 505, 9 S. Ct. 594, 32 L. Ed. 1005 (1889); [Estate of Djelaj](#), 38 Misc. 3d 618, 954 N.Y.S.2d 853 (Sur. Ct. 2012); [Guy Roberts Lumber Co. v. Bridges](#), 203 Or. 482, 280 P.2d 382 (1955).
- 4 [Duniway v. Barton](#), 193 Or. 69, 237 P.2d 930 (1951).
- 5 [Berry Seed Co. v. Hutchings](#), 247 Iowa 417, 74 N.W.2d 233 (1956).
- 6 [Lutz v. Williams](#), 79 W. Va. 609, 91 S.E. 460 (1917).

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3 Am. Jur. 2d Agency § 304

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XIV. Practice and Procedure

A. Actions and Remedies, in General

1. Actions and Remedies of Principal

a. Against Agent

§ 304. Action for money or property of principal in agent's hands

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  [78\(.5\)](#) to [78\(2\)](#)

Forms

Forms relating to purchases with the money for principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Generally, an agent is under a duty to repay or deliver to the principal money or property belonging to the principal which comes into the agent's hands while conducting the business of the agency, and an action will lie at the instance of the principal to recover such money.¹ In such instances, the principal has an action for "money had and received," which is the equivalent of the more modern action for unjust enrichment.²

Generally, in the absence of special circumstances, money received by one in the capacity of agent are not his or hers, and the law implies a promise to pay them to the principal upon demand.³ The necessity of a demand as a condition precedent to an action by the principal against the agent to recover money depends upon whether the agent is in default, and in the absence of any showing of default from some other facts and circumstances, a demand and refusal are necessary.⁴ However, circumstances may exist which impose a duty on the agent to pay over and which dispense with the necessity for a demand.⁵

In an action to recover money paid to the agent by a third person for the benefit of the principal, the third person is not a necessary party defendant.⁶

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Footnotes

- 1 [Gold v. Rowland](#), 296 Conn. 186, 994 A.2d 106 (2010); [Benton v. Singleton](#), 114 Ga. 548, 40 S.E. 811 (1902); [Piedmont Grocery Co. v. Hawkins](#), 83 W. Va. 180, 98 S.E. 152, 4 A.L.R. 828 (1919).
[Restatement Third, Agency § 8.01](#), [comment d](#); [Restatement Third, Agency § 8.02](#), [comment e](#).
- 2 [Gold v. Rowland](#), 296 Conn. 186, 994 A.2d 106 (2010).
- 3 [Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP](#), 201 Cal. App. 4th 368, 135 Cal. Rptr. 3d 69 (2d Dist. 2011).
- 4 [Black v. Hersch](#), 18 Ind. 342, 1862 WL 2165 (1862); [Krause v. Dorrance](#), 10 Pa. 462, 1849 WL 5646 (1849).
- 5 [Black v. Hersch](#), 18 Ind. 342, 1862 WL 2165 (1862); [Krause v. Dorrance](#), 10 Pa. 462, 1849 WL 5646 (1849).
- 6 [Rowland v. Horst](#), 188 Cal. 772, 207 P. 373 (1922).

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3 Am. Jur. 2d Agency § 305

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XIV. Practice and Procedure

A. Actions and Remedies, in General

1. Actions and Remedies of Principal

a. Against Agent

§ 305. Action for money or property of principal in agent's hands—Limitation of actions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  183(5)

When the statute of limitations commences to run against an action by a principal to recover money or property received by an agent turns upon when the agent's duty arises, and this may depend upon the terms of the contract, custom, or the character of the agency.¹ Where the contract fixes a definite time for payment or delivery, the agent's duty arises, and the statute begins to run at that time.² According to some courts, the statute of limitations commences to run—

— when the agent receives the money or property of the principal.³

— when the principal has actual or constructive notice of the facts upon which the right of action is based.⁴

— at the time of the demand by the principal.⁵

— when the agent renders, or offers to render, an account.⁶

— after a reasonable time.⁷

— after the termination of the agency.⁸

Where the agent is guilty of a fraudulent affirmative act which tends to conceal from the principal that any money has been collected, the statute of limitations does not begin to run against the principal until the discovery of the fraud.⁹

One court has held that the statute of limitations for civil actions "not otherwise provided for" applies to a breach of fiduciary duty claim against a negotiating agent.¹⁰

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Footnotes

- 1 Fulkerson v. White, 22 Tex. 674, 1859 WL 6231 (1859).
- 2 Arnett v. Zinn, 20 Neb. 591, 31 N.W. 240 (1887); Perry v. Bedford, 211 S.W. 839 (Tex. Civ. App. Dallas 1919).
- 3 Jewell v. Jewell's Estate, 139 Mich. 578, 102 N.W. 1059 (1905); Minor v. McDowell, 113 So. 576 (Miss. 1927); Rowan v. Chenoweth, 49 W. Va. 287, 38 S.E. 544 (1901).
- 4 Wolcott & Lincoln v. Butler, 155 Kan. 105, 122 P.2d 720, 141 A.L.R. 356 (1942); Buttles v. De Baun, 116 Wis. 323, 93 N.W. 5 (1903).
- 5 Toland v. Sprague, 37 U.S. 300, 9 L. Ed. 1093, 1838 WL 3931 (1838); Wolcott & Lincoln v. Butler, 155 Kan. 105, 122 P.2d 720, 141 A.L.R. 356 (1942).
As to the necessity of a demand, see § 304.
- 6 Greer v. Andrew, 133 Ga. 193, 65 S.E. 416 (1909); Cole v. Baker, 16 S.D. 1, 91 N.W. 324 (1902).
- 7 Mast v. Easton, 33 Minn. 161, 22 N.W. 253 (1885); Mitchell v. McLemore, 9 Tex. 151, 1852 WL 4039 (1852).
- 8 Order of St. Benedict of New Jersey v. Steinhauser, 234 U.S. 640, 34 S. Ct. 932, 58 L. Ed. 1512 (1914); McDonald v. Hartford Trust Co., 104 Conn. 169, 132 A. 902 (1926); Kaleikini v. Waterhouse, 19 Haw. 359, 1909 WL 1368 (1909).
- 9 Wilder v. Secor, 72 Iowa 161, 33 N.W. 448 (1887); Douglas v. Corry, 46 Ohio St. 349, 21 N.E. 440 (1889); Wickersham v. Lee, 83 Pa. 416, 1877 WL 13197 (1877).
- 10 Havoco of America, Ltd. v. Sumitomo Corp. of America, 971 F.2d 1332 (7th Cir. 1992) (applying Illinois law).

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XIV. Practice and Procedure

A. Actions and Remedies, in General

1. Actions and Remedies of Principal

a. Against Agent

§ 306. Liability of agent as dependent on loss or damage

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  183(5)

If an agent violates the principal's proper instructions, the agent's responsibility to the principal is for all loss or damage which naturally results from the agent's acts.¹ An agent can escape liability by showing that no loss or damage resulted to the principal from the disobedience of the latter's instructions or neglect to follow them² or that the agent's disregard of the principal's instructions had no connection with the loss and that it would have occurred if the instructions had been obeyed.³

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Footnotes

- 1 [Bank of British North America v. Cooper](#), 137 U.S. 473, 11 S. Ct. 160, 34 L. Ed. 759 (1890); [Joseph Mogul, Inc., v. C. Lewis Lavine, Inc.](#), 247 N.Y. 20, 159 N.E. 708, 57 A.L.R. 934 (1928).
- 2 [W.W. Gordon & Co. v. Cobb](#), 4 Ga. App. 49, 60 S.E. 821 (1908).
- 3 [Bank of British North America v. Cooper](#), 137 U.S. 473, 11 S. Ct. 160, 34 L. Ed. 759 (1890).

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3 Am. Jur. 2d Agency § 307

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XIV. Practice and Procedure

A. Actions and Remedies, in General


1. Actions and Remedies of Principal

a. Against Agent

§ 307. Agent's defenses and right to setoff or counterclaim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  186

A.L.R. Library

[Insured's Duty to Read Insurance Policy as Affirmative Defense in Claims Against Insurance Agents and Brokers](#), 8 A.L.R.6th 549

[Recovery of money or property entrusted to another for illegal purpose, but not so used](#), 8 A.L.R.2d 307

Forms

Forms relating to goods sold reasonably, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Forms relating to the Statute of Frauds, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Forms relating to repudiation, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

An agent, when sued by the principal for a dereliction of duty, may defend the action on the ground that he or she merely followed and acted in accordance with the instructions of the principal.¹ The agent's liability may be avoided or reduced by the principal's breach of contract, contributory negligence, fault, or failure to mitigate damages.² Also, the agent may defend upon the illegality of the employment or of the transaction.³

Observation:

Generally, a principal is entitled to assert any defense that the agent would be entitled to assert under an agency theory.⁴ Nevertheless, a principal may be liable for an act as to which the agent has a personal immunity from suit.⁵

Some other defenses of the agent, suggested by the Restatement Third of Agency, include the incapacity of the agent (with some limitations)⁶ and the ratification of the act by the principal.⁷

Practice Tip:

The affirmative defense of ratification requires a defendant, after an initial admission of culpability, to present evidence of shared wrongdoing by the opposing party.⁸

Rights of setoff or counterclaim may be available to an agent in an action brought by the principal.⁹ In a suit by a principal for money collected by an agent, the agent may be entitled to a deduction for services or expenses in connection with the subject matter.¹⁰ If the agent pays part of the money concededly due and retains the balance, claiming a right to do so, the principal's acceptance and retention of the amount paid does not constitute an accord and satisfaction precluding a recovery of the balance by the principal.¹¹

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Footnotes

- ¹ [Brush v. Herlihy](#), 8 Ohio Dec. Rep. 104, 5 W.L.B. 647, 1880 WL 6925 (Ohio Dist. Ct. 1880).
- ² [Bulla v. Donahue](#), 174 Ind. App. 123, 366 N.E.2d 233 (1977); [Rozen v. Cohen](#), 350 Mass. 231, 214 N.E.2d 451 (1966); [Warnock v. Bonneville General Agency, Inc.](#), 271 Or. 634, 533 P.2d 333 (1975).
[Restatement Third, Agency § 8.09](#), comment b.

- 3 Dillon v. AFBIC Development Corp., 597 F.2d 556 (5th Cir. 1979); Boylston Bottling Co. v. O'Neill, 231
Mass. 498, 121 N.E. 411, 2 A.L.R. 902 (1919); Stone v. Freeman, 298 N.Y. 268, 82 N.E.2d 571, 8 A.L.R.2d
304 (1948).
Restatement Third, Agency § 8.09, comment c.
- 4 Citicasters Co. v. Bricker & Eckler, L.L.P., 149 Ohio App. 3d 705, 2002-Ohio-5814, 778 N.E.2d 663 (1st
Dist. Hamilton County 2002).
- 5 Murray v. Plainfield Rescue Squad, 210 N.J. 581, 46 A.3d 1262 (2012).
- 6 Restatement Third, Agency § 3.05, comment c.
As to incapacity, generally, a minor who acts as an agent lacks legal capacity to be a trustee of an express
trust or to make an enforceable contract. Nevertheless, such incapacity is not by itself a defense to a claim
for restitution asserted against the minor by the principal or a third party. Restatement Third, Agency § 3.05,
comment c.
- 7 Restatement Third, Agency § 4.01.
- 8 In re Edgewater Medical Center, 332 B.R. 166 (Bankr. N.D. Ill. 2005).
- 9 Bidart Bros. v. Elmo Farming Co., 35 Cal. App. 3d 248, 110 Cal. Rptr. 819 (2d Dist. 1973).
Restatement Third, Agency § 6.06(3) (setoff).
- 10 Blair v. Gariepy, 346 Ill. App. 473, 105 N.E.2d 147 (1st Dist. 1952); Shearman v. Morrison, 149 Pa. 386,
24 A. 313 (1892); Warner v. Cuckow, 90 Wis. 291, 63 N.W. 238 (1895).
- 11 Topas v. John MacGregor Grant, Inc., 18 F.2d 724, 52 A.L.R. 807 (C.C.A. 2d Cir. 1927); Tompkins v. Hill,
145 Mass. 379, 14 N.E. 177 (1887); Hudson v. Yonkers Fruit Co., 258 N.Y. 168, 179 N.E. 373, 80 A.L.R.
1052 (1932).

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3 Am. Jur. 2d Agency § 308

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XIV. Practice and Procedure

A. Actions and Remedies, in General

1. Actions and Remedies of Principal

b. Against Third Person

§ 308. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  183(.5) to 183(2)

Forms

Forms relating to complaints by principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

A principal has standing to sue on a contract entered into by his or her agent on his or her behalf.¹ Thus, a principal is generally entitled to the same remedies against third persons with respect to authorized acts and contracts of an agent as if they were made or done with the principal personally.² The authorized contract of the agent with a third person is the contract of the principal, and the principal may sue thereon though not named therein³ and even though he or she was an undisclosed principal at the time the agent executed the contract.⁴

The right of action upon an implied warranty, or on fraudulent representations made to the agent, is in the principal,⁵ and the principal may maintain an action for money wrongfully taken by a third person from the agent.⁶

Provided the principal has not acted or clothed an agent with such authority to dispose of the property that the rules relating to bona fide purchase apply to protect the third person,⁷ the principal may maintain an action in replevin against a third person who receives the property of the principal as a result of a wrongful disposal thereof by the agent.⁸

Although a principal had the right to demand of an agent the opportunity to defend the agent, the principal had no standing to enter a lawsuit and assert, by means of a cross-action, defenses to the third party's claim against the agent in an action independent of that right.⁹

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Footnotes

- 1 [IMG Fragrance Brands, LLC v. Houbigant, Inc.](#), 759 F. Supp. 2d 363 (S.D. N.Y. 2010) (applying New York law); [Sharma v. Vinmar Intern., Ltd.](#), 231 S.W.3d 405 (Tex. App. Houston 14th Dist. 2007).
- 2 [Ford v. Williams](#), 62 U.S. 287, 21 How. 287, 16 L. Ed. 36, 1858 WL 9383 (1858).
As to a third person's liability to the principal on the agent's authorized contracts, see § 268.
As to a third person's tort liability to the principal, see §§ 269 to 272.
- 3 [Ford v. Williams](#), 62 U.S. 287, 21 How. 287, 16 L. Ed. 36, 1858 WL 9383 (1858).
- 4 § 298.
- 5 [Cushing v. Rice](#), 46 Me. 303, 1858 WL 2500 (1858); [Main v. Professional & Business Men's Life Ins. Co.](#), 80 S.D. 288, 122 N.W.2d 865 (1963).
- 6 [Kearney v. Webb](#), 278 Ill. 17, 115 N.E. 844, 3 A.L.R. 1631 (1917).
- 7 §§ 271, 272.
- 8 [Cleveland Knitting Mills Co. v. Shaff](#), 160 A.D. 107, 145 N.Y.S. 109 (3d Dep't 1914); [Hibbard, Spencer, Bartlett & Co. v. Stein](#), 45 Or. 507, 78 P. 665 (1904).
- 9 [Shank, Irwin, Conant & Williamson v. Durant, Mankoff, Davis, Wolens & Francis](#), 748 S.W.2d 494 (Tex. App. Dallas 1988).

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3 Am. Jur. 2d Agency § 309

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XIV. Practice and Procedure

A. Actions and Remedies, in General


1. Actions and Remedies of Principal

b. Against Third Person

§ 309. Third person's defenses and right to setoff or counterclaim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  185

Forms

Forms relating to fraud as a defense, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

If the principal was disclosed or partially disclosed at the time the agent acted or contracted on his or her behalf, the third person cannot interpose a defense or set off against the principal in an action upon the contract executed by the agent, or for a debt owing to the principal, merely because such defense would have been good against the agent if the latter were suing.¹

When sued, the third person may set up the agent's fraud as a defense,² because the principal is not entitled to reap the benefit of fraudulent transactions or representations of an agent,³ but the principal may not assert unconscionable conduct by the agent as a bar to equitable relief unless the principal had knowledge of the wrong.⁴

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Footnotes

- 1 [Fuller v. Fasig-Tipton Co., Inc.](#), 587 F.2d 103 (2d Cir. 1978); [Braden v. Louisiana State Ins. Co.](#), 1 La. 220, 1830 WL 659 (1830); [Agard v. People's Nat. Bank, Shakopee](#), 169 Minn. 438, 211 N.W. 825, 50 A.L.R. 629 (1927).
As to defenses and setoffs when a third person is sued by an undisclosed principal, see § 310.
- 2 [In re Scott Acquisition Corp.](#), 364 B.R. 562 (Bankr. D. Del. 2007) (applying Florida law); [W.R. Grace & Co. v. Strickland](#), 188 N.C. 369, 124 S.E. 856, 35 A.L.R. 1296 (1924); [Land Finance Corp. v. Sherwin Elec. Co.](#), 102 Vt. 73, 146 A. 72, 75 A.L.R. 1025 (1929).
- 3 [Gower v. Wieser](#), 269 Mich. 6, 256 N.W. 603 (1934); [Crescent Ring Co. v. Travelers' Indemnity Co.](#), 102 N.J.L. 85, 132 A. 106 (N.J. Ct. Err. & App. 1926).
- 4 [Vulcan Detinning Co. v. American Can Co.](#), 72 N.J. Eq. 387, 67 A. 339 (Ct. Err. & App. 1907).

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XIV. Practice and Procedure

A. Actions and Remedies, in General


1. Actions and Remedies of Principal

b. Against Third Person

§ 310. Third person's defenses and right to setoff or counterclaim—Cases involving undisclosed principal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  185

Forms

Forms relating to counterclaims, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

When an agent acting with actual authority makes a contract on behalf of an undisclosed principal, the principal, if a party to the contract, and the third party have the same rights, liabilities, and defenses against each other as if the principal made the contract personally.¹ Thus, generally, one who contracts with the agent of an undisclosed principal, supposing that the agent is the real party in interest, and not chargeable with notice of the existence of the principal, is entitled, if sued by the principal on the contract, to set up any defenses and equities which he or she could have set up against the agent had the latter been in reality the principal suing on his or her own behalf.²

Where a third person contracts with an agent who has not given notice to such third person of the agency, the third person may set off a debt or claim due from such agent personally in an action on the contract by the undisclosed principal.³ However, any agreement between the third person and the agent to cancel the agent's debt to the third person in exchange for services is not effective against the principal if made subsequent to the principal's disclosure.⁴

Payment made in good faith to the agent of an undisclosed principal by one who has dealt with such agent, supposing that the agent was acting for him- or herself, constitutes a good defense as against the principal.⁵ However, a defense or setoff against an agent must, in order to be available against the principal on the ground of nondisclosure, have existed at or before the time of disclosure.⁶

An agent's failure to disclose the principal to the party with whom the agent makes a contract does not entitle such party, when sued on the contract by the principal, to the defense or setoff which would have been good as against the agent individually where the party knew of the existence of the agency, or was put on inquiry with respect thereto, and with reasonable diligence might have learned of it.⁷

Under the Third Restatement of Agency, when an agent has made a contract on behalf of an undisclosed principal, until the third party has notice of the principal's existence, the third party's payment to or settlement of accounts with the agent discharges the third party's liability to the principal.⁸ After the third party has notice of the principal's existence, the third party's payment to or settlement of accounts with the agent discharges the third party's liability to the principal if the agent acts with actual or apparent authority in accepting the payment or settlement.⁹ After receiving notice of the principal's existence, the third party may demand reasonable proof of the principal's identity and relationship to the agent. Until such proof is received, the third party's payment to or settlement of accounts in good faith with the agent discharges the third party's liability to the principal.¹⁰

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Footnotes

- 1 [Restatement Third, Agency § 6.03\(3\).](#)
- 2 [New Jersey Steam Nav. Co. v. Merchant's Bank of Boston, 47 U.S. 344, 6 How. 344, 12 L. Ed. 465, 1848 WL 6458 \(1848\); Huntsberry's, Inc. v. Du Bonnet Shoe Co., 143 A.2d 92 \(Mun. Ct. App. D.C. 1958\); Summerlin v. S & K of Statesboro, Inc., 124 Ga. App. 25, 183 S.E.2d 92 \(1971\).](#)
- 3 [U.S. Nat. Bank of Owensboro, Ky., v. Leflore Grocer Co., 147 Miss. 43, 112 So. 700, 53 A.L.R. 407 \(1927\); Chatham Sec. Corp. v. J.R. Williston & Beane, 16 N.Y.2d 1016, 265 N.Y.S.2d 900, 213 N.E.2d 311 \(1965\); Dixon Livery Co. v. Bond, 117 Va. 656, 86 S.E. 106 \(1915\).](#)
- 4 [Restatement Third, Agency § 6.06\(2\).](#)
- 5 [Lemon v. Deschutes Val. Farms, Inc., 270 Or. 638, 528 P.2d 1339 \(1974\).](#)
- 6 [Weigell v. Gregg, 161 Wis. 413, 154 N.W. 645 \(1915\).](#)
- 7 [Baxter v. Sherman, 73 Minn. 434, 76 N.W. 211 \(1898\).](#)
- 8 [Warner v. Martin, 52 U.S. 209, 11 How. 209, 13 L. Ed. 667, 1850 WL 6832 \(1850\); Standard Brick & Tile Co. v. Posey, 56 Ga. App. 686, 193 S.E. 613 \(1937\); Foreign Trade Banking Corporation v. Gerseta Corporation, 237 N.Y. 265, 142 N.E. 607, 31 A.L.R. 932 \(1923\).](#)
- 9 [Restatement Third, Agency § 6.07\(3\)\(a\).](#)
- 10 [Restatement Third, Agency § 6.07\(3\)\(b\).](#)
- 10 [Restatement Third, Agency § 6.07\(3\)\(c\).](#)

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3 Am. Jur. 2d Agency § 311

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XIV. Practice and Procedure

A. Actions and Remedies, in General

2. Actions and Remedies of Agent

§ 311. Against principal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  89(.5) to 89(4), 90(1), 90(2), 183(.5) to 183(5), 184(.5), 184(1)

Forms

Forms relating to recovering commission or compensation, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

If a principal violates a contractual or quasi-contractual duty owed to an agent, the agent may bring an appropriate action for the breach of that duty.¹ The agent may, under proper circumstances, maintain an action at law for compensation or damages.²

A wrongfully discharged agent has a right of action for damages,⁵ and in such an action, the measure and elements of damages are controlled by the rules governing any other action for an employer's breach of an employment contract.⁶ However, in computing an agent's damages resulting from the wrongful termination of the contract, deductions should generally be made of expense items properly chargeable to the business and also the amounts of the agent's subsequent earnings or the amount which the agent might reasonably have earned at similar work.⁷ In other actions for the breach by the principal of the contract of employment of the agent, the agent is entitled to, as elements of damages for such breach, the difference between the contract price and the market price if the breach involves the failure to furnish goods,⁹ and expenses incurred in the execution of the agency transaction.¹⁰

An agent is not entitled to specific performance of the agency contract.¹¹

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Footnotes

- 1 Riggs v. Lindsay, 11 U.S. 500, 3 L. Ed. 419, 1813 WL 1412 (1813); Farmers' Fertilizer Co. v. Lillie, 18 F.2d 197, 52 A.L.R. 552 (C.C.A. 6th Cir. 1927); Star Clothing Mfg. Co. v. Jones, 142 Ark. 114, 218 S.W. 175, 12 A.L.R. 148 (1920) (oral contract).
- 2 Morehouse v. Shepard, 183 Mich. 472, 150 N.W. 112 (1914); Glover v. Henderson, 120 Mo. 367, 25 S.W. 175 (1894).
- 5 § 41.
- 6 Tiffin Glass Co. v. Stoehr, 54 Ohio St. 157, 43 N.E. 279 (1896).
- 7 Klingman & Scoular v. Racine-Sattley Co., 149 Iowa 634, 128 N.W. 1109 (1910); National Grocery Co. v. A. Santaella & Co., 160 Wash. 262, 295 P. 128 (1931).
- 9 Studebaker Corporation of America v. Dodds & Runge, 161 Ky. 542, 171 S.W. 167 (1914).
- 10 § 229.
- 11 Ireland v. Wynkoop, 36 Colo. App. 205, 539 P.2d 1349 (App. 1975).

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§ 312. Against principal—Principal's defenses and right to setoff or counterclaim

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  186

Forms

Forms relating to statute of frauds or denial of commissions, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

In an action by an agent against the principal, the principal may defend on grounds such as the illegality of the agency agreement or of the services rendered, a violation of the Statute of Frauds, or the disloyalty or insubordination of the agent.¹ In an action by an agent for compensation, the principal may assert by counterclaim the loss alleged to have been sustained from the agent's unfaithful discharge of the contract on which he or she sues.²

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Footnotes

- ¹ As to the effect of the agent's fraud, misconduct, or disobedience on his or her right to compensation, see [§ 237](#).
[Restatement Third, Agency § 3.02](#), comment e (Statute of Frauds); [Restatement Third, Agency § 8.01](#), comment d(2) (breach of fiduciary duty).

2 [Neely v. Wilmore, 124 Ark. 460, 187 S.W. 637 \(1916\).](#)

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XIV. Practice and Procedure

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§ 313. Against third person

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  183(.5) to 183(5)

Forms

Forms relating to rights duties and responsibilities of third-persons to agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

An agent who has a beneficial interest in a contract with a third party may sue in his or her own name¹ although an agent does not have such an interest in a contract as to give rise to the right to maintain an action at law upon it merely because he or she is entitled to a portion of the proceeds as compensation for making it or is liable for its breach.² Similarly, an agent who executes a contract in such a manner to become bound thereby may bring suit on the contract in his or her own name even though the agent disclosed the principal when contracting.³

Observation:

In determining whether an agent of a disclosed principal is a party to the contract and may sue on a note, the agent is not a party to the contract unless the agent and the third party so agree; the manner in which an agent's name appears in a contract is often relevant to establishing whether the agent agreed to become a party to the contract.⁴

Thus, an agent who is the promisee on a contract between his or her principal and a third party may maintain an action for breach of contract in his or her own name.⁵ An agent may bring suit in his or her own name when the agent assumed the position of owner of the goods in transacting the affair.⁶

Some statutes requiring an action to be brought in the name of the real party in interest create an exception under which an action may be brought by the trustee of an express trust without joining the person for whose benefit the suit is brought.⁷ An agent may sue under such exception as a trustee of an express trust.⁸

An agent cannot bring an action in his or her own name for tort by a third party against the principal unless the third party's actions were intended for the purpose of harming the agent's interests.⁹ So, too, an agent who mistakenly pays to a third person money belonging to the principal may maintain an action in his or her own name for money had and received to recover it, especially if such third person is thereby unjustly enriched at the expense of the agent.¹⁰

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Footnotes

- 1 [Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.](#), 630 F.2d 250, 7 Fed. R. Evid. Serv. 725 (5th Cir. 1980).
- 2 [Hopkins v. Ives](#), 263 Ark. 565, 566 S.W.2d 147 (1978).
- 3 [Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.](#), 630 F.2d 250, 7 Fed. R. Evid. Serv. 725 (5th Cir. 1980); [Small v. Ciao Stables, Inc.](#), 289 Md. 554, 425 A.2d 1030 (1981); [Ritchie v. Mundon](#), 268 Or. 283, 520 P.2d 445 (1974).
- 4 As to a third person's liability to an agent of an undisclosed principal, see § 301.
[Kennedy Funding, Inc. v. Greenwich Landing, LLC](#), 135 Conn. App. 58, 43 A.3d 664 (2012), certification denied, 305 Conn. 914, 45 A.3d 99 (2012).
Restatement Third, Agency § 6.01, comment e.
- 5 [Brooks v. Hollaar](#), 297 P.3d 125 (Alaska 2013).
- 6 [Costanzo Coal Min. Co. v. Weirton Steel Co.](#), 150 F.2d 929 (C.C.A. 4th Cir. 1945).
- 7 [Am. Jur. 2d, Parties](#) §§ 41, 42.
- 8 [Wolfe v. Missouri Pac. Ry. Co.](#), 97 Mo. 473, 11 S.W. 49 (1889); [Waterman v. Chicago, M. & St. P.R. Co.](#), 61 Wis. 464, 21 N.W. 611 (1884).
- 9 [Robinson v. Webb](#), 74 Ky. 464, 11 Bush 464, 1875 WL 6765 (1875).
- 10 As to a third person's tort liability to an agent, see § 286.
[Parks v. Fogleman](#), 97 Minn. 157, 105 N.W. 560 (1906).

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§ 314. Against third person—Third person's defenses and right to setoff or counterclaim

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  185

In an action brought by an agent in his or her own name on behalf of the principal, the other party to the contract has all the defenses that would be available if the action were brought by the principal except procedural defenses based upon the personal want of capacity of the principal to maintain the action.¹ Pursuant to the Third Restatement of Agency, when an agent makes a contract on behalf of a disclosed or unidentified principal, unless the principal and the third party agree otherwise, the third party may not set off any amount that the agent independently owes the third party against an amount the third party owes the principal under the contract.² An agent who acquires the beneficial interest in a contract which he or she has made or purported to have made for a principal is subject to the same defenses by the other party thereto as is any assignee of such contract.³

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Footnotes

- ¹ [Woolley v. Loose](#), 57 Utah 336, 194 P. 908, 14 A.L.R. 372 (1920).
- ² [Restatement Third, Agency § 6.06\(1\)\(a\)](#).
- ³ [Chatham Sec. Corp. v. J. R. Williston & Beane](#), 22 A.D.2d 260, 254 N.Y.S.2d 436 (1st Dep't 1964), order [aff'd](#), 16 N.Y.2d 1016, 265 N.Y.S.2d 900, 213 N.E.2d 311 (1965).

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3 Am. Jur. 2d Agency § 315

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3. Actions and Remedies of Third Person

§ 315. Against principal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  184(.5) to 184(2)

Forms

Forms relating to liability on contracts executed by agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Forms relating to authority of agent, generally, see Am. Jur. Legal Forms 2d, Agency; Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Generally, the principal may be sued by the third person on an obligation entered into for the principal by an authorized agent, and it is not a condition precedent to such suit that a demand be made by the third person upon the agent.¹ Further, the mere fact that an agent, in the course of exercising a delegated authority, violates a prohibitive statute does not discharge the principal from the obligations of the contract thus made if such contract is within the scope of the agent's authority.² Nor will the principal be permitted to take advantage of the agent's wrongful act by pleading such wrong in defense of an action at law.³ In order to assess punitive damages against a principal for the acts of an agent, it must be shown that the agent had managerial status or that the principal ordered or ratified the acts in question.⁴

A principal is entitled to all of the defenses arising out of a transaction between an agent and a third person but not to defenses which are personal to the agent.⁵ Circumstances in which it would be improper to permit a third person to proceed solely against a principal based on its vicarious liability for the conduct of an agent include the following:⁶

- (1) when the agent has been exonerated by a finding of nonliability;
- (2) when the plaintiff has settled its claim against the agent;
- (3) when the agent is immune from suit, either by statute or by the common law; and
- (4) when the plaintiff's claim against the agent is procedurally barred by operation of law before the plaintiff asserts a vicarious liability claim against the principal.

A disclosed or partially disclosed principal is not discharged from liability to the other party to a transaction conducted by an agent by payment to, or settlement of accounts with, the agent unless he or she does so in reasonable reliance upon conduct of the other party which is not induced by the agent's misrepresentations and which indicates that the agent has settled the account.⁷ Furthermore, recovery of a judgment against the agent of a disclosed or partially disclosed principal for failure of performance of a contract to which the agent is a party does not thereby discharge the principal⁸ unless the agent and principal were joint contractors.⁹ However, a disclosed or partially disclosed principal ceases to be liable to the other party upon a contract to the extent that the authorized agent, or an agent who is a party to the contract, has satisfied the claim against the principal.¹⁰

A plaintiff may sue a principal based on its vicarious liability for the tortious conduct of its agents without suing the agent.¹¹

Observation:

Even where the agent's conduct is the sole basis for the principal's liability, the agent remains a proper but not a necessary party.¹²

Moreover, where independent negligent acts have been alleged directly against the principal, the principal may still be liable to the third party although the agent has been dismissed.¹³

CUMULATIVE SUPPLEMENT

Cases:

Under California law, the fraud of the agents generally will be imputed to the principal for the purpose of preventing the running of the statute of limitations, whether the principal was aware of it or not; the principal, having received the benefit of his agents' fraud, has no equity in his favor. [Graebner v. James](#), 963 F. Supp. 2d 938 (N.D. Cal. 2013).

If a plaintiff's claim against the principal does not involve an agent's breach of a duty that the agent separately owed to the third party, that claim does not involve true vicarious liability and the dismissal of the plaintiff's claims against the agent will not

constitute an adjudication on the merits as to whether the agent's acts or omissions constitute the breach of duty independently owed by the principal. [Bailey v. Schaaf](#), 304 Mich. App. 324, 852 N.W.2d 180 (2014).

Company which property owner hired to provide project management services for property expansion project was owner's agent, and thus acts and omissions of company could be considered those of owner, in determination of contributory negligence in owner's negligence action against electrical subcontractor arising out of electrical accident; cover letter for request for proposals informed bidders that company was acting as agents for the project, purchase order which owner sent to contractor provided that scope of work was under direction of company, and owner's general manager testified that company was owner's "agent for construction on site." [MEMC Pasadena, Inc. v. Riddle Power, LLC](#), 472 S.W.3d 379 (Tex. App. Houston 14th Dist. 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Winkler v. V.G. Reed & Sons, Inc.](#), 638 N.E.2d 1228 (Ind. 1994); [Sanders v. Sheets](#), 287 S.W. 1069 (Mo. Ct. App. 1926).
As to the principal's duties and liability to a third person, see §§ 243 to 266.
- 2 [Rickards v. Rickards](#), 98 Md. 136, 56 A. 397 (1903).
- 3 [New York Life Ins. Co. v. Babcock](#), 104 Ga. 67, 30 S.E. 273 (1898).
- 4 [Hartman v. Shell Oil Co.](#), 68 Cal. App. 3d 240, 137 Cal. Rptr. 244 (4th Dist. 1977); [Hatfield v. Max Rouse & Sons Northwest](#), 100 Idaho 840, 606 P.2d 944 (1980); [Foust v. Valleybrook Realty Co.](#), 4 Ohio App. 3d 164, 446 N.E.2d 1122 (6th Dist. Wood County 1981).
- 5 [New Jersey Life Ins. Co. v. Getz](#), 622 F.2d 198 (6th Cir. 1980).
- 6 [Abshire v. Methodist Healthcare-Memphis Hospitals](#), 325 S.W.3d 98 (Tenn. 2010).
- 7 [Southern Pac. Transp. Co. v. Continental Shippers Ass'n, Inc.](#), 642 F.2d 236 (8th Cir. 1981).
[Restatement Third, Agency § 6.07\(1\)](#).
- 8 [Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.](#), 630 F.2d 250, 7 Fed. R. Evid. Serv. 725 (5th Cir. 1980) (applying Texas law); [Grinder v. Bryans Road Bldg. & Supply Co., Inc.](#), 290 Md. 687, 432 A.2d 453 (1981) (only where the identity of the principal was not known at the time of judgment).
[Restatement Third, Agency § 6.09\(1\)](#).
- 9 [National Trout Festival, Inc. v. Cannon](#), 32 Mich. App. 517, 189 N.W.2d 69 (1971).
- 10 [Fortuna Corp. v. Sierra Blanca Sales Co., Inc.](#), 89 N.M. 187, 548 P.2d 865 (1976).
As to the election of remedies doctrine with respect to undisclosed principals, see §§ 288, 289.
[Restatement Third, Agency § 6.08](#), comment e (performance by agent of principal's duty under contract).
- 11 [Abshire v. Methodist Healthcare-Memphis Hospitals](#), 325 S.W.3d 98 (Tenn. 2010).
- 12 [Abshire v. Methodist Healthcare-Memphis Hospitals](#), 325 S.W.3d 98 (Tenn. 2010).
- 13 [Evans v. Lima Lima Flight Team, Inc.](#), 373 Ill. App. 3d 407, 311 Ill. Dec. 521, 869 N.E.2d 195 (1st Dist. 2007).

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3 Am. Jur. 2d Agency § 316

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§ 316. Against agent

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  79(.5), 79(1), 79(3), 184(.5) to 184(2)

Forms

Forms relating to complaints or answers and unauthorized agents, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

The third person may have an action in contract against the agent where the instrument was executed in such fashion that the agent is personally bound.¹

Where the agent, without authority or in excess of his or her authority, contracts with a third person, who sues upon the implied warranty of authority,² recovery is measured by real damages sustained by the breach of warranty.³ In other words, the third party's damages are measured not by the contract but by the injury resulting from the agent's want of power.⁴ The agent may be held accountable for money paid or work or labor performed under the contract or for special damages sustained by reason of the wrong in assuming to act without authority.⁵ Also, the costs of an unsuccessful action against the principal are proper elements of damage.⁶

The third person has a quasi-contractual action for money had and received where the agent receives the money improperly or when grounds for rescission by the third person exist, and pays the money over to the principal, although having notice that the latter is not entitled to the money but that the third person is.⁷

In an action against an agent on a contract between the principal and a third person, to which the agent is a party, the agent has all the defenses which arise out of the transaction itself⁸ and all of the defenses that are personal to the agent.⁹ Furthermore, the agent may, with the consent of the principal, set off any claim which the principal might have set off in an action by the third person against the principal.¹⁰

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Footnotes

- 1 [Albany & Rensselaer Iron & Steel Co. v. Lundberg](#), 121 U.S. 451, 7 S. Ct. 958, 30 L. Ed. 982 (1887); [Hughey v. Truitt](#), 196 S.W. 1065 (Mo. Ct. App. 1917).
As to an agent's contractual liability to a third person, see §§ 273 to 279.
As to an agent's tort liability to a third person, see § 280.
- 2 §§ 274, 275.
- 3 [American Sur. Co. v. Morton](#), 1912 OK 284, 32 Okla. 687, 122 P. 1103 (1912).
- 4 [Hettinger v. Kleinman](#), 733 F. Supp. 2d 421 (S.D. N.Y. 2010) (applying Florida law).
- 5 [Farmers' Co-op. Trust Co. v. Floyd](#), 47 Ohio St. 525, 26 N.E. 110 (1890).
- 6 [Groeltz v. Armstrong](#), 125 Iowa 39, 99 N.W. 128 (1904).
- 7 [Alexander v. Coyne](#), 143 Ga. 696, 85 S.E. 831 (1915).
- 8 [Berman v. Dean Witter & Co., Inc.](#), 44 Cal. App. 3d 999, 119 Cal. Rptr. 130 (2d Dist. 1975); [Howard Cleaners of Baltimore, Inc. v. Perman](#), 227 Md. 291, 176 A.2d 235 (1961).
[Restatement Third, Agency § 6.01](#), comment e.
- 9 [Restatement Third, Agency § 6.01](#), comment e.
- 10 [Howard Cleaners of Baltimore, Inc. v. Perman](#), 227 Md. 291, 176 A.2d 235 (1961); [Moerbe v. Meece](#), 630 S.W.2d 278 (Tex. App. Austin 1981), judgment aff'd in part, rev'd in part on other grounds, 631 S.W.2d 729 (Tex. 1982).
[Restatement Third, Agency § 6.06\(3\)](#).

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XIV. Practice and Procedure

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§ 317. Against agent—Limitation of actions

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  78(2.1), 79(1), 79(2), 186

Where an action by one who has relied upon the misrepresentations of the defendant as to his or her authority to contract for another is one for deceit upon the false representations, the statute of limitations begins to run from the discovery of the fraud.¹ Where, however, the action is grounded upon breach of warranty, the cause of action accrues not at the time of misrepresentation, nor at the time of the discovery of the false representation, but at the time the wrong to the plaintiff was complete, and the plaintiff suffered actual damages.²

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Footnotes

- ¹ [Pierson v. Holdridge](#), 92 Kan. 365, 140 P. 1032 (1914); [Moore v. Maddock](#), 251 N.Y. 420, 167 N.E. 572, 64 A.L.R. 1189 (1929).
- ² [Moore v. Maddock](#), 251 N.Y. 420, 167 N.E. 572, 64 A.L.R. 1189 (1929); [Kennedy v. Stonehouse](#), 13 N.D. 232, 100 N.W. 258 (1904).

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§ 318. Parties defendant; joinder of principal and agent

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  89(4.5), 188

Trial Strategy

[Whom to Sue—Multiple Defendants](#), 5 Am. Jur. Trials 1

Forms

Forms relating to undisclosed agencies, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Injured third parties are not required to sue both the principal and the agent to recover from the principal under respondeat superior; third parties have the choice to sue either the agent or principal or join both.¹ Thus, one dealing with an agent for an undisclosed principal may, at his or her election, sue one or both on the contract, and when the election is made to sue the one, the other is not a necessary party to the suit.² Where the existence of the agency is controversial, the creditor may institute an action in the alternative against both the alleged agent and the undisclosed principal.³ Moreover, although there is authority

to the contrary,⁴ generally, the third party may, after full disclosure of the principal, join the principal and the agent as parties defendant in an action on the contract,⁵ but the plaintiff must elect against one or the other prior to judgment.⁶

An action to reform an instrument based on false and fraudulent representation of an agent must be brought against the principal only.⁷

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Footnotes

- 1 Austin v. Specialty Transp. Services, Inc., 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004).
- 2 Ford v. Williams, 62 U.S. 287, 21 How. 287, 16 L. Ed. 36, 1858 WL 9383 (1858); Lowery v. Statewide Healthcare Service, Inc., 585 So. 2d 778 (Miss. 1991); Heinrichs v. Evins Personnel Consultants, Inc., No. One, 486 S.W.2d 935 (Tex. 1972); Jensen v. Arntzen, 67 Wash. 2d 202, 406 P.2d 954 (1965).
- 3 Klinger v. Modesto Fruit Co., 107 Cal. App. 97, 290 P. 127 (3d Dist. 1930); Cheel Const. Co. v. Lubben, 30 N.J. Super. 148, 103 A.2d 610 (App. Div. 1954); North Carolina Lumber Co. v. Spear Motor Co., 192 N.C. 377, 135 S.E. 115 (1926).
As to alternative liability of an agent and an undisclosed principal, and an election by a third person, see §§ 288, 289.
- 4 Weil v. Raymond, 142 Mass. 206, 7 N.E. 860 (1886); Anchor Warehouse Co. v. Mead, 181 S.W. 1057 (Mo. Ct. App. 1916).
- 5 Conner v. Steel, Inc., 28 Colo. App. 1, 470 P.2d 71 (App. 1970) (unless either party objects); Johnson v. Fischer, 108 Ill. App. 2d 433, 247 N.E.2d 805 (2d Dist. 1969); Moerbe v. Meece, 630 S.W.2d 278 (Tex. App. Austin 1981), judgment aff'd in part, rev'd in part on other grounds, 631 S.W.2d 729 (Tex. 1982).
- 6 § 289.
- 7 Kemp v. Funderburk, 224 N.C. 353, 30 S.E.2d 155 (1944).

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Research References

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West's Key Number Digest, [Principal and Agent](#)  78(3), 79(4), 89(5), 189(.5) to 189(4)

A.L.R. Library

A.L.R. Index, Agency

West's A.L.R. Digest, [Principal and Agent](#)  78(3), 79(4), 89(5), 189(.5) to 189(4)

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B. Pleadings

§ 319. Generally; necessity for plaintiff to allege agency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  78(3), 79(4), 89(5), 189(.5), 189(1), 189(4)

A.L.R. Library

[Manner and sufficiency of pleading agency in contract action, 45 A.L.R.2d 583](#)

Forms

Forms relating to complaints regarding goods bought or sold by agents, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Generally, in the absence of express statutory provision, in actions on contracts, either by or against the principal, there is no necessity for the plaintiff to allege that the contract was executed through an agent; in other words, the contract may be pleaded as if it were the contract of the principal, without mentioning the agency.¹

Generally, under the rule upholding a pleading that does not refer to the agency, the agent, who is not even mentioned, need not be named or otherwise identified.² However, some courts take the view that at least where the alleged principal is a corporation, the agent whose acts are relied upon must be named or otherwise effectively identified.³

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Footnotes

- 1 [Bank of Metropolis v. Guttschlick](#), 39 U.S. 19, 10 L. Ed. 335, 1840 WL 4622 (1840); [White's Farm Dairy, Inc. v. De Laval Separator Co.](#), 433 F.2d 63, 8 U.C.C. Rep. Serv. 154 (1st Cir. 1970) (applying Massachusetts law); [City of Phoenix v. Linsenmeyer](#), 86 Ariz. 328, 346 P.2d 140 (1959); [Reichler v. Tillman](#), 21 N.C. App. 38, 203 S.E.2d 68 (1974).
- 2 [Duval Investment Co. v. Stockton](#), 54 Fla. 296, 45 So. 497 (1907); [Crowder v. Reed](#), 80 Ind. 1, 1881 WL 6853 (1881).
- 3 [Cherokee Mills v. Gate City Cotton Mills](#), 122 Ga. 268, 50 S.E. 82 (1905); [Michelin Tire Co. v. Schulz](#), 295 Pa. 140, 145 A. 67 (1929) (overruled on other grounds by, [AM/PM Franchise Ass'n v. Atlantic Richfield Co.](#), 526 Pa. 110, 584 A.2d 915, 14 U.C.C. Rep. Serv. 2d 11 (1990)).

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3 Am. Jur. 2d Agency § 320

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XIV. Practice and Procedure

B. Pleadings

§ 320. Manner and sufficiency of pleading agency or authority

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  189(1)

A.L.R. Library

[Manner and sufficiency of pleading agency in contract action](#), 45 A.L.R.2d 583

Forms

Forms relating to actual authority, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

In contract actions where acts of the agent are relied upon to bind the defendant, allegations that the defendant contracted "by" or "through" an agent¹ and pleadings alleging that the person relying upon an agreement contracted with another "as" or "acting as" the agent of the opposing party² are sufficient. It is also sufficient to allege that the pleader contracted with one described as the agent of the other party³ although there is authority to the contrary.⁴ A plaintiff need not specifically plead apparent agency; however, the issue can be considered where the plaintiff has alleged an agency or employee relationship.⁵

An allegation of agency as such is a statement of ultimate fact and further allegations explaining how the fact of agency originated are unnecessary.⁶ In some jurisdictions, however, a complaint relying on agency must plead facts which, if proved, could establish the existence of an agency relationship,⁷ and it is insufficient to merely plead the legal conclusion of agency.⁸

Where the pleader relying on a contract made for the opposing party by the latter's agent undertakes to plead specifically the authority of the agent, a general averment stating that the agent was authorized is sufficient; facts showing the authority need not be set forth.⁹ A pleader who specifically describes the agent's authority or employment undertakes the risk that the particular facts alleged may be held insufficient to justify reliance on the acts of the agent.¹⁰

Where the third person to a contract seeks to enforce rights thereunder against a person who was acting, or claims to have been acting, only as the agent of another, the pleader must allege facts justifying the conclusion that the agent acted in his or her own interest.¹¹ If the third person with whom a contract is made by an agent seeks to hold the agent individually responsible, on an instrument which he ostensibly signed in a representative capacity for a disclosed principal, the pleading should contain allegations fixing such personal liability.¹²

CUMULATIVE SUPPLEMENT

Cases:

Livestock seller's mere allegations that a buyer had previously purchased livestock from seller for and on behalf of a cattle company, and that seller knew of the company, were insufficient to support a plausible finding of a principal-agent relationship between the buyer and the company, under Kansas law, based on apparent authority, absent allegations that the company had taken steps to hold the buyer out as its agent prior to current auction, or any intentional or negligent act by the company that would permit a reasonable person to believe that the buyer had authority to bind the company to a sales contract for the cattle. [Rezac Livestock Commission Company, Inc. v. Pinnacle Bank](#), 255 F. Supp. 3d 1150 (D. Kan. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Bank of Metropolis v. Guttschlick](#), 39 U.S. 19, 10 L. Ed. 335, 1840 WL 4622 (1840); [Nechtman v. Wellington Plaza, Inc.](#), 97 Ga. App. 40, 102 S.E.2d 57 (1958); [Innovative Data Systems of Louisiana, Inc. v. Ellender](#), 316 So. 2d 12 (La. Ct. App. 1st Cir. 1975); [State ex rel. Stiers Bros. Const. Co. v. Hughes](#), 354 Mo. 659, 190 S.W.2d 880 (1945).
- 2 [Carruthers v. Flaum](#), 365 F. Supp. 2d 448 (S.D. N.Y. 2005) (applying New York law); [Harris v. Barnes](#), 100 Ga. App. 412, 111 S.E.2d 147 (1959); [Rodgers v. Arapahoe Pipe Line Co.](#), 181 Kan. 579, 313 P.2d 740 (1957).
- 3 [Fidelity-Phenix Fire Ins. Co. v. Lawler](#), 38 Ala. App. 245, 81 So. 2d 908 (1955) ("an agent of the defendant"); [Keil Motor Co. v. Royal Ins. Co., Limited, of Liverpool, England](#), 36 Del. 24, 171 A. 201 (Super. Ct. 1933) ("defendant's agent"); [Walker-Smith Co. v. Jackson](#), 123 S.W.2d 993 (Tex. Civ. App. Amarillo 1938), writ dismissed, judgment correct ("its agent").
- 4 [Camichos v. Diana Stores Corp.](#), 157 Fla. 349, 25 So. 2d 864 (1946) ("the agent"); [Interior Warehouse Co. v. Dunn](#), 80 Or. 528, 157 P. 806 (1916) ("the agents of the plaintiff").
- 5 [Doe v. Brouillette](#), 389 Ill. App. 3d 595, 329 Ill. Dec. 260, 906 N.E.2d 105, 244 Ed. Law Rep. 242 (1st Dist. 2009).
- 6 [Skopp v. Weaver](#), 16 Cal. 3d 432, 128 Cal. Rptr. 19, 546 P.2d 307 (1976).

- 7 Jefferson v. Collins, 2012 WL 5941953 (D.D.C. 2012); McWilliams v. S.E., Inc., 581 F. Supp. 2d 885 (N.D. Ohio 2008); Coghlan v. Beck, 2013 IL App (1st) 120891, 368 Ill. Dec. 407, 984 N.E.2d 132 (App. Ct. 1st Dist. 2013).
- 8 McWilliams v. S.E., Inc., 581 F. Supp. 2d 885 (N.D. Ohio 2008); Oliveira-Brooks v. Re/Max Intern., Inc., 372 Ill. App. 3d 127, 309 Ill. Dec. 889, 865 N.E.2d 252 (1st Dist. 2007).
- 9 Corso v. Dixon, 348 Ill. App. 378, 109 N.E.2d 241 (1st Dist. 1952); Grady v. Appalachian Electric Power Co., 126 W. Va. 546, 29 S.E.2d 878 (1944) (as authorized representative of defendant); Herro v. Wisconsin Federal Surplus Property Development Corp., 42 Wis. 2d 87, 166 N.W.2d 433 (1969).
- 10 Hammond v. Hayes, 11 Alaska 322, 1947 WL 789 (Terr. Alaska 1947); King v. Rutledge, 208 Ga. 172, 65 S.E.2d 801 (1951); Johnston v. J. R. Watkins Co., 1945 OK 123, 195 Okla. 341, 157 P.2d 755 (1945).
- 11 Dumaine v. Gay, Sullivan & Co., 171 So. 396 (La. Ct. App., Orleans 1936); Alter v. Frick, 62 Mo. App. 453, 1895 WL 1990 (1895).
- 12 Cannon v. Miller Rubber Products Co., 128 Ohio St. 72, 190 N.E. 210 (1934).

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XIV. Practice and Procedure

B. Pleadings

§ 321. Allegation of ratification or estoppel

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  189(1)

A.L.R. Library

[Manner and sufficiency of pleading agency in contract action](#), 45 A.L.R.2d 583

Forms

Forms relating to ratification or estoppel, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

An allegation of agency is sufficient to admit evidence of ratification either in the party's main case or in rebuttal.¹ Also, an inadequacy or ambiguity in an allegation of authorized agency may be cured by an allegation in the same pleading to the effect that the party ratified the transaction.² If the acts of the alleged agent were unauthorized, it is necessary to plead that the acts were subsequently ratified by the principal.³ To plead ratification, however, the pleader must use words to support the implication of a technical ratification; it is not enough merely to allege that the defendant received the benefits or results of the transaction without the further allegation that he or she did this with knowledge of the assumption of agency by the actual contractor and thus, retrospectively, consented thereto.⁴

If an action by a third person against the principal is based on estoppel, all representations, acts, and conduct of the agent on which the third person relies to raise the estoppel against the principal must be specially pleaded before evidence to establish the same may be received.⁵

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Footnotes

- 1 [Happ Bros. Co. v. Hunter Mfg. & Commission Co.](#), 145 Ga. 836, 90 S.E. 61 (1916); [McDonnell v. Pennington](#), 40 Haw. 265, 1953 WL 7564 (1953); [Hoyt v. Thompson](#), 19 N.Y. 207, 1859 WL 8269 (1859).
- 2 [Rogers v. Beiderwell](#), 175 Kan. 223, 262 P.2d 814, 45 A.L.R.2d 578 (1953); [Nelson v. Monroe Automobile & Supply Co.](#), 180 La. 245, 156 So. 293 (1934).
- 3 [Rachlin v. Edmison](#), 2002 PA Super 387, 813 A.2d 862 (2002).
- 4 [Reeves & Co. v. Miller](#), 48 Ind. App. 339, 95 N.E. 677 (1911); [Noble v. Plouf](#), 154 La. 429, 97 So. 599 (1923).
- 5 [McAdow v. Kansas City Western Ry. Co.](#), 100 Kan. 309, 164 P. 177 (1917); [Bigler v. Baker](#), 40 Neb. 325, 58 N.W. 1026 (1894); [Deming Inv. Co. v. Shawnee Fire Ins. Co.](#), 1905 OK 68, 16 Okla. 1, 83 P. 918 (1905).

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§ 322. Pleadings by defendant

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  189(2) to 189(3.5)

Forms

Forms relating to ratification or estoppel, generally, see Am. Jur. Pleading and Practice Forms, Agency[[Westlaw® Search Query](#)]

Forms relating to answers, generally, see Am. Jur. Pleading and Practice Forms, Agency[[Westlaw® Search Query](#)]

A principal who seeks to avoid liability on a contract entered into by an alleged agent on the ground that the agent was without authority must deny not only the authority but also ratification.¹ On the other hand, an agent who seeks to avoid personal liability on a contract need not plead specially that he or she made the contract as agent and disclosed the principal² although there is authority to the contrary.³ An agent defending a suit by a principal on the theory that he or she is entitled to retain part of the money collected for the principal as compensation for services rendered must set up the claim by way of counterclaim.⁴

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Footnotes

¹ Clark's Ex'rs v. Van Riemsdyk, 13 U.S. 153, 3 L. Ed. 688, 1815 WL 1498 (1815).

² Scone v. Amos, 38 Minn. 79, 35 N.W. 575 (1887); Blumenkamp v. Tower Grove Bank & Trust Co., 483 S.W.2d 611 (Mo. Ct. App. 1972).

3 [Pugh v. Eylers, 16 La. App. 576, 135 So. 75 \(2d Cir. 1931\).](#)

4 [Hudson v. Yonkers Fruit Co., 258 N.Y. 168, 179 N.E. 373, 80 A.L.R. 1052 \(1932\).](#)

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  189(3.5)

Forms

Forms relating to replies, generally, see Am. Jur. Pleading and Practice Forms, Agency[[Westlaw® Search Query](#)]

If the answer in an agency case sets up new matter, it may be controverted by a reply.¹ If a case is tried without a reply to a plea, as if it had properly been interposed, the defendant will be treated on appeal as having waived it.² A statute may require that allegations of agency and authority pleaded as new matter in a reply are to be deemed to be controverted by the defendant without the filing of any pleading or affidavit denying the same.³

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Footnotes

- ¹ [Sturgeon v. Culver](#), 87 Kan. 404, 124 P. 419 (1912).
- ² [Comer v. Way](#), 107 Ala. 300, 19 So. 966 (1895).
- ³ [Continental Ins. Co. of New York v. Pierce](#), 39 Kan. 396, 18 P. 291 (1888).

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C. Evidence

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Research References

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  18.1 to 23(5), 78(4) to 78(6), 79(5), 89(6) to 89(8), 118 to 123(12), 190(.5) to 190(3)

A.L.R. Library

A.L.R. Index, Agency

West's A.L.R. Digest, [Principal and Agent](#)  18.1 to 23(5), 78(4) to 78(6), 79(5), 89(6) to 89(8), 118 to 123(12), 190(.5) to 190(3)

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XIV. Practice and Procedure

C. Evidence

§ 324. Generally; burden of proof

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  18.1 to 23(5), 78(4) to 78(6), 79(5), 89(6) to 89(8), 118 to 123(12), 190(.5) to 190(3)

A.L.R. Library

[Liability of Hospital or Sanitarium for Negligence of Independent Physician or Surgeon—Exception Where Physician Has Ostensible Agency or "Agency by Estoppel", 64 A.L.R.6th 249](#)

When the existence of the relationship of principal and agent is in issue, the burden of proving the issue rests with the party who asserts the existence of the relationship.¹ Likewise, the burden of proving ostensible agency is upon the party asserting that relationship.² Thus, the party asserting ostensible agency must demonstrate that the principal, by its conduct, caused him or her to reasonably believe that the putative agent was an employee or agent of the principal and that he or she justifiably relied on the appearance of agency.³ In other words, the burden of proving the apparent authority of an agent is on the party seeking to bind the principal⁴ by the act or contract in controversy.⁵ Conversely, the principal has the burden of proving that an agent acted within the scope of his or her authority so as to bind the third party by the agent's acts.⁶ Thus, the person alleging the agency must prove not only the fact of its existence but also its extent.⁷

In an action against an agent by the third person, claiming that the principal was undisclosed, the third person has the burden of proving it was unaware of the agency-principal relationship.⁸ However, another court has held that an agent who attempts

to avoid liability on a contract has the burden of proving that the agency relationship and the identity of the principal were in fact disclosed.⁹

The burden of proving a revocation or other termination of an agency is on the party asserting it.¹⁰ Where the plaintiff has the right to rely on a presumption that the defendant's agent was acting within his or her implied or ostensible authority, the burden is on the defendant to prove that the agent did not have the authority in question and that the plaintiff or the agent knew it.¹¹

The party alleging a ratification of the unauthorized acts of an agent has the burden of establishing the fact,¹² and the burden of establishing the principal's knowledge of all the material facts is on the person attempting to sustain the ratification.¹³

An agent seeking to recover compensation must prove a promise of the principal to pay him or her.¹⁴ Also, in an action to recover commissions, the agent has the burden of proving his or her performance.¹⁵ In an accounting action against an agent, a principal has the burden of proving that the agent received the funds or property and the amount or quality thereof,¹⁶ but the agent has the burden of proving that he or she properly disposed of money or property received on the principal's behalf.¹⁷ For instance, the burden to render an accounting is on the fiduciary once the principal has shown that funds have been entrusted to the fiduciary and have not been paid over or otherwise accounted for.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

Under New York law, the party asserting the existence of an agency relationship bears the burden of establishing its existence. [In re Suntech Power Holdings Co., Ltd.](#), 520 B.R. 399 (Bankr. S.D. N.Y. 2014).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S. v. Kolon Industries, Inc.](#), 2013 WL 682896 (E.D. Va. 2013); [L and V Contractors, LLC v. Heritage Warranty Ins. Risk Retention Group, Inc.](#), 136 Conn. App. 662, 47 A.3d 887 (2012); [Greater Houston Radiation Oncology, P.A. v. Sadler Clinic Ass'n, P.A.](#), 384 S.W.3d 875 (Tex. App. Beaumont 2012), petition for review filed, (Dec. 14, 2012) and petition for review filed, (Feb. 22, 2013).
- 2 [Ermoian v. Desert Hosp.](#), 152 Cal. App. 4th 475, 61 Cal. Rptr. 3d 754 (4th Dist. 2007).
- 3 [Baptist Memorial Hosp. System v. Sampson](#), 969 S.W.2d 945 (Tex. 1998).
- 4 [Eakin v. Eakin](#), 973 So. 2d 873 (La. Ct. App. 3d Cir. 2007).
- 5 [Howard v. U.S.](#), 31 Fed. Cl. 297 (1994); [Dorsky Hodgson & Partners, Inc. v. National Council of Sr. Citizens](#), 766 A.2d 54 (D.C. 2001); [Hendricks v. Great Plains Supply Co.](#), 609 N.W.2d 486 (Iowa 2000).
- 6 [Hatten Machinery Co. v. Bruch](#), 59 Wash. 2d 757, 370 P.2d 600 (1962).
- 7 [Bayless v. Christie, Manson & Woods Intern., Inc.](#), 2 F.3d 347 (10th Cir. 1993) (applying Oklahoma law); [Golden Rule Ins. Co. v. Tomlinson](#), 47 Kan. App. 2d 408, 277 P.3d 421 (2012); [Lavoie v. Safecare Health Service, Inc.](#), 840 P.2d 239 (Wyo. 1992).
- 8 [A.S. Abell Co. v. Skeen](#), 265 Md. 53, 288 A.2d 596 (1972) (abrogated on other grounds by, [Buck v. Cam's Broadloom Rugs, Inc.](#), 328 Md. 51, 612 A.2d 1294 (1992)).
- 9 [Jensen v. Alaska Valuation Service, Inc.](#), 688 P.2d 161 (Alaska 1984).

- 10 Exchange State Bank of Glendive v. Occident Elevator Co., 95 Mont. 78, 24 P.2d 126, 90 A.L.R. 740 (1933);
H. Michaelyan, Inc., v. New Jersey Fidelity & Plate Glass Ins. Co., 229 A.D. 123, 241 N.Y.S. 142 (1st Dep't
1930).
- 11 R. H. Kyle Furniture Co. v. Russell Dry Goods Co., 340 S.W.2d 220, 85 A.L.R.2d 428 (Ky. 1960).
As to the presumption that an agent was acting within his or her authority, see § 326.
- 12 Johnson v. First Nat. Bank of Rome, Ga., 253 Ga. 233, 319 S.E.2d 440 (1984); Empson v. Missouri Highway
& Transp. Com'n, 649 S.W.2d 517 (Mo. Ct. App. W.D. 1983); Thermo Products Co. v. Chilton Independent
School Dist., 647 S.W.2d 726, 10 Ed. Law Rep. 447 (Tex. App. Waco 1983), writ refused n.r.e., (June 1,
1983).
- 13 McRoberts v. Phelps, 391 Pa. 591, 138 A.2d 439 (1958).
- 14 Hudson v. Yonkers Fruit Co., 258 N.Y. 168, 179 N.E. 373, 80 A.L.R. 1052 (1932).
- 15 Rosner v. U.S. Waterways Corp., 278 A.D. 168, 104 N.Y.S.2d 217 (1st Dep't 1951), judgment aff'd, 304
N.Y. 580, 107 N.E.2d 77 (1952).
- 16 Savoie v. Rogers' Estate, 410 So. 2d 683 (La. 1981).
- 17 Kennard v. Glick, 183 Cal. App. 2d 246, 7 Cal. Rptr. 88 (2d Dist. 1960); Savoie v. Rogers' Estate, 410 So.
2d 683 (La. 1981); Mercantile Trust Co., N. A. v. Harper, 622 S.W.2d 345 (Mo. Ct. App. E.D. 1981).
- 18 Andrews Farms v. Calcot, Ltd., 527 F. Supp. 2d 1239 (E.D. Cal. 2007) (applying California law).

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XIV. Practice and Procedure

C. Evidence

§ 325. Presumptions and inferences

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  19, 78(4), 89(6), 190(1)

Forms

Forms relating to presumptions or inferences, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Where the existence of the agency depends upon the acts of the parties, the law makes no presumption of agency; it is a fact to be proved.¹ A presumption of agency may arise, however, where an agency may arise by operation of law.² Likewise, evidence of conduct of a principal apparently approving an agent's unauthorized acts which are capable of ratification suffices, in the absence of evidence to the contrary, to raise a presumption of ratification.³ In fact, once the principal discovers the agent's unauthorized act, the principal must promptly repudiate the act, or the court will presume the principal ratified the act.⁴

When once shown to have existed, an agency relationship will be presumed to have continued in the absence of anything to show its revocation or termination.⁵

An agent acting in the course of a disclosed agency is presumed to procure the extension of credit to the principal exclusively, and the burden of establishing the contrary is on the person asserting it.⁶

Generally, negligence or misconduct by an agent will not be presumed in the absence of proof.⁷

The relationship of husband and wife does not, per se, raise a presumption that the former acted as agent for the latter.⁸

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Footnotes

- 1 Butcher v. Superior Offshore Intern., LLC, 754 F. Supp. 2d 829 (E.D. La. 2010); Kennedy v. Western Sizzlin Corp., 857 So. 2d 71 (Ala. 2003); Reliant Energy Services, Inc. v. Cotton Valley Compression, L.L.C., 336 S.W.3d 764 (Tex. App. Houston 1st Dist. 2011), rule 53.7(f) motion granted, (Mar. 25, 2011).
- 2 Shugar v. Antrim, 177 Kan. 70, 276 P.2d 372 (1954).
- 3 Ocean Acc. & Guarantee Corp. v. Denner, 1952 OK 395, 207 Okla. 416, 250 P.2d 217, 37 A.L.R.2d 448 (1952).
- 4 C.T. v. Liberal School Dist., 562 F. Supp. 2d 1324, 235 Ed. Law Rep. 928 (D. Kan. 2008).
- 5 Stout v. McNary, 75 Idaho 99, 267 P.2d 625 (1954); Kansas City Life Ins. Co. v. Nipper, 1935 OK 1127, 174 Okla. 634, 51 P.2d 741 (1935); Bouldin v. Woosley, 525 S.W.2d 276 (Tex. Civ. App. Waco 1975).
- 6 John Roach, Jr., Inc. v. Pingpank, 39 N.J. Super. 336, 121 A.2d 32 (App. Div. 1956); Weimer v. Bockel, 128 Pa. Super. 385, 194 A. 318 (1937); Hammond v. Herbert Hood Co., 31 Tenn. App. 683, 221 S.W.2d 98 (1948).
- 7 Hartzell v. Bank of Murray, 211 Ky. 263, 277 S.W. 270 (1925); Yarborough v. Fulton, 78 S.W.2d 247 (Tex. Civ. App. El Paso 1935), writ dismissed; Mattice v. Equitable Life Assur. Soc. of U.S., 270 Wis. 504, 71 N.W.2d 262, 55 A.L.R.2d 1206 (1955).
As to the presumption of the communication of notice or knowledge to the principal as the basis for the rule imputing notice or knowledge to the principal, see § 256.
- 8 J. C. Jacobs Banking Co. v. Campbell, 406 So. 2d 834 (Ala. 1981).

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§ 326. Presumptions and inferences—Presumptions as to agent's authority

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  119(1) to 119(7)

Generally, the actions of an agent are not presumed to be within the scope of his or her authority¹ although his or her authority is presumed to be coextensive with the business entrusted to his or her care.² Thus, if an agent's authority is presumed to be coextensive with the business entrusted to his or her care, it includes only those contracts and acts incidental to the management of the particular business with which he or she is entrusted.³ In any event, where the fact of agency is uncontroverted or admitted, and the agent was apparently acting for the principal as to the business in hand, a presumption arises that the agent was acting within the scope of his or her authority.⁴ Moreover, an agent's authority may be presumed by the principal's silence if the principal knowingly allows another to act for him or her as agent.⁵ Likewise, if it appears that an agent has done an act for the benefit of his or her principal and the principal has not questioned the authority of the agent to bind him or her, it will be presumed, until the contrary appears, that the agent was duly authorized.⁶

Observation:

Agency law presumes imputation even where the agent acts less than admirably, exhibits poor business judgment, or commits fraud.⁷

Authority of an agent to execute a deed for the principal may be presumed from proof that the principal received the purchase money and that the vendee went into possession under the deed, which, on its face, purports to have been executed by such agent, and has held such possession for a number of years.⁸ So, too, as between the principal and an agent, where one sells the land of another under an assumed authority to do so, this is prima facie evidence of authority.⁹

CUMULATIVE SUPPLEMENT

Cases:

Actual authority of an agent to bind a principal may be implied from the circumstances surrounding the transaction at issue; those circumstances must show that the principal actually intended the agent to possess the authority to enter into the transaction on behalf of the principal. [Law Offices of Jeffrey Sherbow, PC v. Fieger & Fieger, PC](#), 326 Mich. App. 684, 930 N.W.2d 416 (2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Mars, Inc. v. Gonzalez](#), 71 S.W.3d 434 (Tex. App. Waco 2002).
- 2 [Long v. Lopez](#), 115 S.W.3d 221 (Tex. App. Fort Worth 2003).
- 3 [Gaines v. Kelly](#), 235 S.W.3d 179 (Tex. 2007).
- 4 [Montgomery Production Credit Ass'n v. M. Hohenberg & Co.](#), 31 Ala. App. 117, 12 So. 2d 865 (1943); [Grauel v. Rohe](#), 185 Md. 121, 43 A.2d 201 (1945); [Bank of Chatham v. Arendall](#), 178 Va. 183, 16 S.E.2d 352 (1941).
- 5 [Curto v. Illini Manors, Inc.](#), 405 Ill. App. 3d 888, 346 Ill. Dec. 229, 940 N.E.2d 229 (3d Dist. 2010).
- 6 [Smith v. Kriska](#), 113 S.W.3d 293 (Mo. Ct. App. E.D. 2003).
- 7 [Kirschner v. KPMG LLP](#), 15 N.Y.3d 446, 912 N.Y.S.2d 508, 938 N.E.2d 941 (2010).
- 8 [Bias v. Cockrum](#), 37 Miss. 509, 1859 WL 5342 (1859).
- 9 [Montgomery v. Pacific Coast Land Bureau](#), 94 Cal. 284, 29 P. 640 (1892).

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3 Am. Jur. 2d Agency § 327

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XIV. Practice and Procedure

C. Evidence

§ 327. Proof of agency relationship

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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A.L.R. Library

[Admissibility of oral agreement respecting duration of employment or agency where written contract is silent, 85 A.L.R.2d 1331](#)

Trial Strategy

[Establishing Agency by the Circumstances in Real Estate Transactions, 45 Am. Jur. Proof of Facts 3d 453](#)

The existence of an agency may be proved by direct evidence of an express contract of agency,¹ by competent evidence which has a tendency to prove an agency,² or by circumstantial evidence³ but not by conclusory, unsupported allegations.⁴ In any case, direct evidence is not indispensable.⁵

When the facts relied upon to establish the existence of an agency relationship are conflicting, or conflicting inferences can be drawn from them, the question is one for the jury.⁶ Thus, according to one view, even though the alleged principal and agent are the only witnesses called, and they both categorically deny the existence of the relationship, the jury may weigh and consider

the whole evidence and draw fair and reasonable inferences therefrom.⁷ According to another view, a finding of agency must be supported by something more than mere suspicion,⁸ and where the only evidence that a person is an agent of another party is the mere assumption that such agency existed, such evidence has no probative value and is insufficient to authorize a finding that such an agency exists.⁹ Nevertheless, while apparent agency cannot be based upon an assumption or mere belief that an agency relationship exists, a claim of agency may be proved, as any other fact, by circumstantial evidence.¹⁰

An agent's general reputation as the agent of the alleged principal is admissible when offered to prove elements of apparent agency as opposed to the fact of actual agency.¹¹

Circumstances may be relied on to prove agency, such as the relation of the parties to each other and their conduct with reference to the subject matter of the contract.¹² Marital status, however, cannot in and of itself prove the agency relationship.¹³

Under the parol evidence rule, evidence of a prior or contemporaneous oral agreement specifying the term or duration of an agency contract is inadmissible in litigation involving an otherwise valid written contract which is silent respecting its term or duration.¹⁴

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Footnotes

- 1 [Daly v. Williams, 78 Ariz. 382, 280 P.2d 701 \(1955\).](#)
- 2 [U.S. v. Greer, 383 F. Supp. 2d 861 \(W.D. N.C. 2005\), aff'd, 182 Fed. Appx. 198 \(4th Cir. 2006\) \(testimony of agent\); State ex rel. Stiers Bros. Const. Co. v. Hughes, 354 Mo. 659, 190 S.W.2d 880 \(1945\); Scherbenske v. Maier, 71 N.W.2d 770 \(N.D. 1955\).](#)
- 3 [Stopka v. American Family Mut. Ins. Co., Inc., 816 F. Supp. 2d 516 \(N.D. Ill. 2011\) \(applying Illinois law\); Cox v. Mayan Lagoon Estates, Ltd, 319 Ga. App. 101, 734 S.E.2d 883 \(2012\); Jarvis v. K & E Re One, LLC, 390 S.W.3d 631 \(Tex. App. Dallas 2012\).](#)
- 4 [Valenti v. Qualex, Inc., 970 F.2d 363 \(7th Cir. 1992\).](#)
- 5 [Jackson v. Schrader, 676 N.W.2d 599 \(Iowa 2003\), as amended on denial of reh'g, \(Mar. 16, 2004\) \(implied agency\).](#)
- 6 [Knauerhaze v. Nelson, 361 Ill. App. 3d 538, 296 Ill. Dec. 889, 836 N.E.2d 640 \(1st Dist. 2005\).](#)
- 7 [McCabe v. Howard, 281 So. 2d 362 \(Fla. 2d DCA 1973\); Andrew v. Kolsrud, 218 Iowa 15, 253 N.W. 913 \(1934\); J.S. Cosden, Inc., v. Meinecke, 36 S.W.2d 790 \(Tex. Civ. App. El Paso 1931\), writ dismissed w.o.j., \(July 22, 1931\).](#)
- 8 [Paramount Fund, Inc. v. Cusaac, 282 S.C. 497, 319 S.E.2d 354 \(Ct. App. 1984\) \(holding that agency must be clearly established by the facts\).](#)
- 9 [Reindel v. Mobile Content Network Co., LLC, 652 F. Supp. 2d 1278 \(N.D. Ga. 2009\) \(applying Georgia law\); Jennings v. Psychiatric Health Services, Inc., 258 Ga. App. 111, 573 S.E.2d 115 \(2002\).](#)
- 10 [Lopez v. El Palmar Taxi, Inc., 297 Ga. App. 121, 676 S.E.2d 460 \(2009\).](#)
- 11 [Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 7 Fed. R. Evid. Serv. 725 \(5th Cir. 1980\) \(applying Texas law\).](#)
- 12 [Lopez v. El Palmar Taxi, Inc., 297 Ga. App. 121, 676 S.E.2d 460 \(2009\); Acordia of Virginia Ins. Agency, Inc. v. Genito Glenn, L.P., 263 Va. 377, 560 S.E.2d 246 \(2002\).](#)
- 13 [Botticello v. Stefanovicz, 177 Conn. 22, 411 A.2d 16 \(1979\).](#)
- 14 [Hotchkiss v. Nelson R. Thomas Agency, 96 Cal. App. 2d 154, 214 P.2d 568 \(2d Dist. 1950\); Davis v. Fidelity Fire Ins. Co. of Baltimore, 208 Ill. 375, 70 N.E. 359 \(1904\).](#)

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§ 328. Proof of authority or ratification

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  18.1 to 23(5)

A.L.R. Library

[Implied or apparent authority of agent to purchase or order goods or merchandise, 55 A.L.R.2d 6](#)

[Salesman's power to pledge employer's or principal's personal property, 49 A.L.R.2d 1271](#)

An agent's authority may be established by circumstantial evidence;¹ there is no requirement that the agent's authority to act be in writing.² All the circumstances of the transaction, including the previous conduct of the principal and the customs or usages of the business, may be considered on the issue as to the implied authority of an agent to exercise powers in excess of those expressly given.³ Evidence of an agent's authority to bind the principal may be found in the fact that the alleged principal acquiesced in, recognized, or adopted similar acts done on other occasions by the assumed agent.⁴ Assurances of one who assumes to act as an agent of his or her authority to bind another are not, standing alone, sufficient.⁵

Inasmuch as ratification of an agent's contract may be either express or implied,⁶ it need not be shown by direct evidence but can be established by circumstantial evidence.⁷ To be available to one relying thereon, however, a principal's ratification of an agent's unauthorized act must be clearly shown, either directly or impliedly, from clear and unequivocal circumstances.⁸

Parol evidence, in the form of direct testimony or proof of the surrounding circumstances, is admissible to establish the extent or existence of an agent's authority in the absence of any proof of such authority contained in a written instrument, such as a properly executed power of attorney.⁹

CUMULATIVE SUPPLEMENT

Cases:

Because ratification of agent's unauthorized acts is an affirmative defense, the burden of proving ratification rests on the party alleging the defense. [Elting v. Elting](#), 288 Neb. 404, 849 N.W.2d 444 (2014).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Van't Rood v. County of Santa Clara](#), 113 Cal. App. 4th 549, 6 Cal. Rptr. 3d 746 (6th Dist. 2003); [Demming v. Underwood](#), 943 N.E.2d 878 (Ind. Ct. App. 2011), transfer denied, 962 N.E.2d 647 (Ind. 2011); [Jarvis v. K & E Re One, LLC](#), 390 S.W.3d 631 (Tex. App. Dallas 2012).
- 2 [Demming v. Underwood](#), 943 N.E.2d 878 (Ind. Ct. App. 2011), transfer denied, 962 N.E.2d 647 (Ind. 2011).
- 3 [Trane Co. v. Gilbert](#), 267 Cal. App. 2d 720, 73 Cal. Rptr. 279 (2d Dist. 1968); [Hawkins v. Windhorst](#), 77 Kan. 674, 96 P. 48 (1908).
- 4 [Stoneman v. Fox Film Corp.](#), 295 Mass. 419, 4 N.E.2d 63, 107 A.L.R. 989 (1936); [Roberson v. Bondurant](#), 41 N.M. 638, 73 P.2d 321 (1937); [Boillin-Harrison Co. v. Lewis & Co.](#), 182 Tenn. 342, 187 S.W.2d 17 (1945).
As to an agent's testimony with respect to his or her authority, see [§ 329](#).
Restatement Third, Agency § 2.02, comments e, f.
- 5 [Info. Leasing Corp. v. Chambers](#), 152 Ohio App. 3d 715, 2003-Ohio-2670, 789 N.E.2d 1155, 50 U.C.C. Rep. Serv. 2d 816 (1st Dist. Hamilton County 2003).
- 6 [§ 169](#).
- 7 [Kelley v. Sparks](#), 193 Ark. 811, 102 S.W.2d 838 (1937).
- 8 [Haswell v. Standring](#), 152 Iowa 291, 132 N.W. 417 (1911); [Rice v. Tavernier](#), 8 Minn. 248, 8 Gil. 214, 1863 WL 1375 (1863); [Boulding v. Slick](#), 1932 OK 694, 161 Okla. 189, 17 P.2d 391 (1932).
- 9 [Little v. Clark](#), 592 S.W.2d 61 (Tex. Civ. App. Fort Worth 1979), writ refused n.r.e., (June 4, 1980).

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§ 329. Testimony of agent

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  21

Forms

Forms relating to declaration or statement of agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Although an alleged agent's extrajudicial statements are not admissible to prove the fact of the agency,¹ that fact may, when it rests in parol, be established by the testimony of the agent at trial; the agent's testimony is admissible on the whole subject of the existence of the agency and the scope and extent of the authority conferred.² Accordingly, an agent is a competent witness as to his or her dealings with another either to prove or disprove that he or she is or is not that other's agent.³

Caution:

The uncorroborated testimony of an alleged agent is not sufficient to prove his or her agency relationship.⁴ Further, a purported agent cannot unilaterally create an apparent agency through his or her own words or conduct.⁵ In some jurisdictions, however, the testimony of the agent him- or herself is competent evidence to establish the existence of such agency relationship,⁶ and in others, a

court may look to the testimony of the alleged agent to see whether or not there are any other circumstances which, when coupled with this declaration, would be sufficient to clothe the agent with the authority to bind the principal.⁷

Upon a disputed question of his or her authority, an agent may be called as a witness to testify concerning that matter.⁸ An agent may also testify as to the authority of an alleged agent of their common principal, providing the testimony is based upon personal knowledge.⁹ However, neither the fact of the agent's employment nor his or her representations are, per se, sufficient to establish the scope of his or her authority.¹⁰

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Footnotes

- 1 § 330.
- 2 *Treadwell Ford, Inc. v. Courtesy Auto Brokers, Inc.*, 426 So. 2d 859 (Ala. Civ. App. 1983); *Ripani v. Liberty Loan Corp.*, 95 Cal. App. 3d 603, 157 Cal. Rptr. 272 (3d Dist. 1979); *Kerney v. Aetna Cas. & Sur. Co.*, 648 S.W.2d 247 (Tenn. Ct. App. 1982).
- 3 *Slotkin v. Citizens Cas. Co. of New York*, 614 F.2d 301 (2d Cir. 1979); *Arnold v. Grimmeissen*, 103 Ohio App. 447, 2 Ohio Op. 2d 364, 143 N.E.2d 615 (1st Dist. Hamilton County 1957).
- 4 *Valley Ranch Development Co., Ltd. v. F.D.I.C.*, 960 F.2d 550, 23 Fed. R. Serv. 3d 414 (5th Cir. 1992); *Succession of McCrocklin*, 242 La. 404, 137 So. 2d 274 (1961) (holding, however, that the agent's testimony was sufficiently corroborated).
- 5 *Kral, Inc. v. Southwestern Life Ins. Co.*, 999 F.2d 101 (5th Cir. 1993); *Bethany Pharmacal Co., Inc. v. QVC, Inc.*, 241 F.3d 854 (7th Cir. 2001).
- 6 *U.S. v. Greer*, 383 F. Supp. 2d 861 (W.D. N.C. 2005), *aff'd*, 182 Fed. Appx. 198 (4th Cir. 2006) (applying North Carolina law).
- 7 *J'Carpc, LLC v. Wilkins*, 545 F. Supp. 2d 1330 (N.D. Ga. 2008) (applying Georgia law).
- 8 *Gould v. Norfolk Lead Co.*, 63 Mass. 338, 9 Cush. 338, 1852 WL 4535 (1852); *Piercy v. Hedrick*, 2 W. Va. 458, 1868 WL 1551 (1868).
- 9 *Exchange State Bank of Glendive v. Occident Elevator Co.*, 95 Mont. 78, 24 P.2d 126, 90 A.L.R. 740 (1933).
- 10 *Empson v. Missouri Highway & Transp. Com'n*, 649 S.W.2d 517 (Mo. Ct. App. W.D. 1983).

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§ 330. Evidence of extrajudicial statements of agent

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  22(1) to 22(3), 190(2)

A.L.R. Library

[Competence, as against principal, of statements by agent to prove scope, as distinguished from fact, of agency, 3 A.L.R.2d 598](#)

Forms

Forms relating to declaration or statement of agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

The admissions, statements, and declarations of an agent, other than the agent's testimony in the case in which the issue arises,¹ are not admissible as against the principal to prove agency or the scope or extent thereof.² Nor may an agent's authority to bind the principal be shown by evidence of the agent's extrajudicial statements.³ In short, the declarations of an agent made outside the presence of a purported principal, or not authorized or ratified by the principal, cannot be testified to by a third person for the purpose of proving the scope or extent of the authority of the agent.⁴

Declarations of an agent may be admissible as proof in corroboration of other testimony showing the existence of the agency⁵ or where it is necessary to determine whether the third party to a transaction dealt with the alleged agent in his or her capacity as agent or as principal.⁶

Although some courts hold that ex parte statements of an agent are not competent to show the extent or scope of his or her authority even where the fact of agency has already been established by competent evidence,⁷ others hold that after the fact of agency has been shown by competent evidence, statements by the agent tending to show the scope or extent of his or her authority are admissible against the principal.⁸

Caution:

The preliminary proof of agency requisite to render the statements of the purported agent admissible against the principal must be made by evidence other than the declarations of the alleged agent.⁹

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Footnotes

- 1 § 329.
- 2 *Essco Geometric v. Harvard Industries*, 46 F.3d 718, 25 U.C.C. Rep. Serv. 2d 661 (8th Cir. 1995) (applying Missouri law); *Brookfield Clothes, Inc. v. Tandler Textiles, Inc.*, 78 A.D.2d 841, 433 N.Y.S.2d 161 (1st Dep't 1980); *S. F. McCotter & Son, Inc. v. O.H.A. Industries, Inc.*, 54 N.C. App. 151, 282 S.E.2d 584 (1981).
- 3 *Voegeli v. Waterbury Yellow Cab Co.*, 111 Conn. 407, 150 A. 303, 69 A.L.R. 902 (1930); *Bowles Co. v. Fraser*, 59 Wash. 336, 109 P. 812 (1910); *Mattice v. Equitable Life Assur. Soc. of U.S.*, 270 Wis. 504, 71 N.W.2d 262, 55 A.L.R.2d 1206 (1955).
- 4 *Estate of Pruyn v. Axmen Propane, Inc.*, 2009 MT 448, 354 Mont. 208, 223 P.3d 845, 70 U.C.C. Rep. Serv. 2d 644 (2009).
- 5 *Hawthorne v. Davis*, 268 Ark. 131, 594 S.W.2d 844 (1980); *Dealers Specialties, Inc. v. Neighborhood Housing Services, Inc.*, 54 N.C. App. 46, 283 S.E.2d 155 (1981), decision modified on other grounds, 305 N.C. 633, 291 S.E.2d 137 (1982); *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962).
- 6 *Gardner v. Marshall*, 145 P.2d 678 (Cal. App. 2d Dist. 1944), opinion vacated on other grounds, 24 Cal. 2d 686, 151 P.2d 122 (1944); *Friend Lumber Co. v. Armstrong Bldg. Finish Co.*, 276 Mass. 361, 177 N.E. 794, 80 A.L.R. 599 (1931); *U.S. Fidelity & Guaranty Co. v. Arrington*, 255 So. 2d 652 (Miss. 1971).
- 7 *U.S. v. Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970); *Rosser v. Standard Mill. Co.*, 312 S.W.2d 106 (Mo. 1958); *Walker v. Pacific Mobile Homes, Inc.*, 68 Wash. 2d 347, 413 P.2d 3 (1966).
- 8 *Wilson & Co. v. Clark*, 259 Ala. 619, 67 So. 2d 898 (1953); *Annapolis Fire & Marine Ins. Co. v. Rich*, 239 Md. 573, 212 A.2d 249 (1965); *Pokorny v. Williams*, 199 Or. 17, 260 P.2d 490 (1953).
- 9 *Friend Lumber Co. v. Armstrong Bldg. Finish Co.*, 276 Mass. 361, 177 N.E. 794, 80 A.L.R. 599 (1931); *Bingham v. National Bank of Montana*, 105 Mont. 159, 72 P.2d 90, 113 A.L.R. 315 (1937); *Thermo Products Co. v. Chilton Independent School Dist.*, 647 S.W.2d 726, 10 Ed. Law Rep. 447 (Tex. App. Waco 1983), writ refused n.r.e., (June 1, 1983).

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C. Evidence

§ 331. Evidence as to agent's acts or conduct

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  22(1) to 22(3)

Generally, any competent witness may tell what he or she saw an agent do though a witness may not state the inferences he or she drew therefrom.¹ However, the fact of agency cannot be established by proof of the acts of a professed agent unless the acts are of such a character and so continuous as to justify a reasonable inference that the principal had knowledge of them² and assented to them.³ In other words, the acts of a person assuming to be the representative of another are not competent to prove the agency in the absence of evidence tending to show the principal's knowledge of such acts or assent to them.⁴ Where the acts are of such character and so continuous as to justify a reasonable inference that the principal had knowledge of them and would not have permitted them if unauthorized, the acts themselves are competent evidence of agency.⁵ However, according to one court, where the only evidence that a person is an agent of another party is an inference drawn from the actions of that person that he or she was an agent of another party, such evidence has no probative value and is insufficient to authorize a finding that such an agency exists.⁶

Generally, an agent's authority to bind the principal may not be shown by evidence of the agent's acts.⁷ Nor may the extent of an agent's authority be shown by testimony as to his or her acts and conduct not within the actual or implied scope of the powers granted by the principal.⁸ Agency must be established by some action of the principal, not merely based on the acts of the claimed agent.⁹ However, after an agency is prima facie established, evidence of the agent's acts may be introduced to bind the principal if they were within the agent's actual or ostensible authority.¹⁰ Also, what an agent did with the principal's knowledge and approval is circumstantial evidence of what the agent was authorized to do.¹¹

Footnotes

- 1 Beaucage v. Mercer, 206 Mass. 492, 92 N.E. 774 (1910).
- 2 Pytlik v. Professional Resources, Ltd., 887 F.2d 1371 (10th Cir. 1989); Rigler v. North Dakota Const. Co., 57 N.D. 37, 220 N.W. 441 (1928); Furlong v. Donhals, Inc., 87 R.I. 46, 137 A.2d 734 (1958).
- 3 J. R. Watkins Co. v. Vangen, 116 N.W.2d 641 (N.D. 1962).
- 4 Bank of New York v. Alderazi, 28 Misc. 3d 376, 900 N.Y.S.2d 821 (Sup 2010).
- 5 Hawkins v. Windhorst, 77 Kan. 674, 96 P. 48 (1908).
- 6 Shivers v. Sexton, 164 Ga. App. 490, 296 S.E.2d 749 (1982).
- 7 Daniel v. Atlantic Coast Line R. Co., 136 N.C. 517, 48 S.E. 816 (1904); Valiquette v. Clark Bros. Coal Min. Co., 83 Vt. 538, 77 A. 869 (1910).
- 8 In re Union City Milk Co., 329 Mich. 506, 46 N.W.2d 361, 34 A.L.R.2d 283 (1951).
- 9 Golden Rule Ins. Co. v. Tomlinson, 47 Kan. App. 2d 408, 277 P.3d 421 (2012).
- 10 J. R. Watkins Co. v. Vangen, 116 N.W.2d 641 (N.D. 1962).
- 11 Reverie Lingerie, Inc. v. McCain, 258 N.C. 353, 128 S.E.2d 835 (1963); Boillin-Harrison Co. v. Lewis & Co., 182 Tenn. 342, 187 S.W.2d 17 (1945).

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§ 332. Conclusion or opinion of witness as to agency or authority

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  18.1, 20(1), 20(2), 190(.5), 190(2)

A witness generally may not testify to the existence or nonexistence of an agency or employment relationship as a conclusion or ultimate fact.¹

However, the general rule is inapplicable where the statement of the witness as to the existence or nonexistence of such relationship is in substance a statement of fact within that witness's knowledge.² So, too, a witness may be permitted to testify as a fact that he or she was or was not the agent or employee of a certain person notwithstanding the general rule excluding testimony as to such relationship as being a conclusion or an ultimate fact.³ Likewise, testimony of a witness not a party to the relationship that the relationship did or did not exist may be admissible as a statement mainly of fact.⁴

While testimony of facts going to show the existence or nonexistence of authority of an agent is admissible, a witness generally cannot testify that he or she or another did or did not have authority for particular purposes.⁵ Similarly, although a witness may testify as to what another's duties are, he or she may not give an opinion as to whether such person performed such duties.⁶

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Footnotes

- ¹ [Wheeler & Motter Mercantile Co. v. Lamerton](#), 8 F.2d 957, 44 A.L.R. 769 (C.C.A. 8th Cir. 1925); [Creasman v. First Federal Sav. & Loan Ass'n of Hendersonville](#), 279 N.C. 361, 183 S.E.2d 115 (1971).
- ² [Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.](#), 630 F.2d 250, 7 Fed. R. Evid. Serv. 725 (5th Cir. 1980); [Hawthorne v. Davis](#), 268 Ark. 131, 594 S.W.2d 844 (1980); [Vaughan's Seed Store v. Stringfellow](#), 56 Fla. 708, 48 So. 410 (1908).
- ³ [Collette v. Sarrasin](#), 184 Cal. 283, 193 P. 571 (1920); [Spears v. Black](#), 190 Mich. 693, 157 N.W. 382 (1916).

- 4 Lozier Auto. Exch. v. Interstate Cas. Co., 197 Iowa 935, 195 N.W. 885 (1923); Irwin v. Worcester Paper
Box Co., 246 Mass. 453, 141 N.E. 286 (1923); Blowers v. Southern Ry., 74 S.C. 221, 54 S.E. 368 (1906).
5 Western Stone Co. v. Muscial, 196 Ill. 382, 63 N.E. 664 (1902); Parrot v. Mexican Cent. Ry. Co., 207 Mass.
184, 93 N.E. 590 (1911); McCarthy v. Anaconda Copper Mining Co., 70 Mont. 309, 225 P. 391 (1924).
6 Eureka Block Coal Co. v. Wells, 29 Ind. App. 1, 61 N.E. 236 (1901); Parker v. Hoefer, 118 Vt. 1, 100 A.2d
434, 38 A.L.R.2d 1216 (1953).

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3 Am. Jur. 2d Agency § 333

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XIV. Practice and Procedure

C. Evidence

§ 333. Parol evidence to establish principal or agent as party to written contract

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  18.1, 20(1), 20(2), 190(.5), 190(2)

A principal, in order to establish a right upon a written contract, may introduce extrinsic evidence to show that the party who executed the contract did so as his or her agent, and upon such evidence, the principal may maintain a right against the other contracting party despite the fact that the agent signed a contract required by the Statute of Frauds to be in writing.¹ This proof does not contradict the writing; it only explains the transaction.²

Under the Restatement Third of Agency, unless the contract explicitly excludes the principal as a party, parol evidence is admissible to identify a principal and to subject the principal to liability on a contract made by an agent. Furthermore, if a contract explicitly makes a principal a party, parol evidence is not admissible to show agreement that the principal would not become a party.³

Where the instrument is ambiguous as to the agent's personal liability on contracts executed for the principal, parol evidence as to the intention of the parties may be introduced.⁵ The rule is otherwise, however, if the instrument is not ambiguous or if the agent is attempting, in order to escape liability, to show, despite the terms of the instrument in which he or she appears as a principal, that he or she was executing the instrument for an undisclosed principal.⁶ However, if the fact of agency does not appear in an integrated contract, an agent who appears to be a party thereto cannot introduce extrinsic evidence to show that he or she is not a party except for the purpose of reforming the contract or to establish that his or her name was signed as the business name of the principal and that it was so agreed by the parties.⁷

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Footnotes

- 1 Nash v. Towne, 72 U.S. 689, 18 L. Ed. 527, 1866 WL 9392 (1866); Milonas v. Sarantitis, 109 Cal. App. 343, 292 P. 978 (1st Dist. 1930); Kingsley v. Siebrecht, 92 Me. 23, 42 A. 249 (1898).
- 2 Ford v. Williams, 62 U.S. 287, 21 How. 287, 16 L. Ed. 36, 1858 WL 9383 (1858); Rankin v. Blaine County Bank, 1908 OK 7, 20 Okla. 68, 93 P. 536 (1908).
- 3 Restatement Third, Agency § 6.01, comment c.
- 5 Case Mfg Co v. Soxman, 138 U.S. 431, 11 S. Ct. 360, 34 L. Ed. 1019 (1891); United Packinghouse Workers of America v. Maurer-Neuer, Inc., 272 F.2d 647 (10th Cir. 1959); Looman Realty Corp. v. Broad St. Nat. Bank of Trenton, 32 N.J. 461, 161 A.2d 247 (1960).
- 6 Ford v. Williams, 62 U.S. 287, 21 How. 287, 16 L. Ed. 36, 1858 WL 9383 (1858); Martin v. Xarin Real Estate, Inc., 703 F.2d 883 (5th Cir. 1983); Kingsberry Homes v. Findley, 242 Ga. 362, 249 S.E.2d 51 (1978).
- 7 CTI-Container Leasing Corp. v. Oceanic Operations Corp., 682 F.2d 377 (2d Cir. 1982); Kelrick v. Koplin, 73 Ill. App. 2d 63, 219 N.E.2d 758 (1st Dist. 1966); Yellow Mfg. Acceptance Corp. v. Britz, 8 Wis. 2d 666, 100 N.W.2d 325, 80 A.L.R.2d 1134 (1960).

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XIV. Practice and Procedure

D. Questions of Law and Fact

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Research References

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  24, 79(7), 89(9), 124(1) to 124(3), 193

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A.L.R. Index, Agency

West's A.L.R. Digest, [Principal and Agent](#)  24, 79(7), 89(9), 124(1) to 124(3), 193

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XIV. Practice and Procedure

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§ 334. Generally

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  24, 79(7), 89(9), 124(1) to 124(3), 193

When the facts relied upon to establish the existence of an agency are undisputed, and conflicting inferences cannot be drawn from them, the question of the existence of the agency is one of law for the court.¹ On the other hand, when the facts pertaining to the existence of an agency are conflicting, or conflicting inferences may be drawn from the evidence, the question is one of fact for the jury or for the court as the trier of fact if the case is tried without a jury.² The weight of such evidence to show agency is a question for the trier of fact or the jury.³

Whether the principal is disclosed is a question of fact.⁴ Determining whether an agent has bound him- or herself personally,⁵ and what was the understanding of both parties to the contract,⁶ is a question of fact to be decided by the jury.

CUMULATIVE SUPPLEMENT

Cases:

Although the resolution of the issues of the existence of an agency relationship and the scope of the agency relationship is usually a question of fact for the trier of fact to decide, it may be decided by the trial court as a question of law when the material facts relating to the relationship are undisputed and only one reasonable conclusion may be drawn from the undisputed facts or where no liability exists as a matter of law. [Bowyer as Next Friend of Eskra v. Adono, 2020 IL App \(3d\) 180685, 441 Ill. Dec. 259, 156 N.E.3d 594 \(App. Ct. 3d Dist. 2020\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [Draper v. ConAgra Foods, Inc.](#), 92 Ark. App. 220, 212 S.W.3d 61 (2005); [Thornton v. Ford Motor Co.](#), 2013 OK CIV APP 7, 297 P.3d 413 (Div. 3 2012); [All Med, LLC. v. Randolph Engineering Co., Inc.](#), 228 W. Va. 634, 723 S.E.2d 864 (2012).
- 2 [American Prairie Const. Co. v. Hoich](#), 560 F.3d 780 (8th Cir. 2009); [Nazar v. Branham](#), 291 S.W.3d 599 (Ky. 2009), as modified on denial of reh'g, (Aug. 27, 2009); [All Med, LLC. v. Randolph Engineering Co., Inc.](#), 228 W. Va. 634, 723 S.E.2d 864 (2012).
- 3 [Dodson Intern. Parts, Inc. v. Altendorf](#), 347 F. Supp. 2d 997 (D. Kan. 2004), modified on reconsideration, 2005 WL 475363 (D. Kan. 2005) (applying Kansas law); [Fertitta v. Herndon](#), 175 Md. 560, 3 A.2d 502, 120 A.L.R. 1317 (1939).
- 4 [Water, Waste & Land, Inc. v. Lanham](#), 955 P.2d 997 (Colo. 1998); [Central Missouri Professional Services, Inc. v. Shoemaker](#), 108 S.W.3d 6 (Mo. Ct. App. W.D. 2003); [Indep. Furniture Sales, Inc. v. Martin](#), 184 Ohio App. 3d 562, 2009-Ohio-5697, 921 N.E.2d 718 (8th Dist. Cuyahoga County 2009).
- 5 [Pacheco v. Massachusetts Cas. Ins. Co.](#), 610 A.2d 111 (R.I. 1992).
- 6 [Thompson v. Floyd](#), 310 Ga. App. 674, 713 S.E.2d 883 (2011).

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XIV. Practice and Procedure

D. Questions of Law and Fact

§ 335. Extension of credit, breach of duty, disclosure, ratification, repudiation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  24, 79(7), 89(9), 124(1) to 124(3), 193

Whether credit was given to the agent of a disclosed principal alone is a question of fact to be determined by the jury¹ as is whether an agent breached his or her duty.² Also, whether the fact of the agency and the name of the principal were disclosed or known to the third party so as to protect the agent from personal liability on the transaction is a question of fact.³

Whether the facts show a ratification is generally one for the jury⁴ although it is a question of law where the facts are undisputed.⁵ Likewise, whether there has been a repudiation within a reasonable time is a question of fact.⁶

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Footnotes

- 1 [Anderson v. Timberlake](#), 114 Ala. 377, 22 So. 431 (1897); [Maxwell v. Dunham](#), 222 Mo. App. 193, 297 S.W. 94 (1927).
- 2 [Mallamo v. Hartman](#), 70 Ariz. 294, 219 P.2d 1039 (1950), opinion modified on reh'g, 70 Ariz. 420, 222 P.2d 797 (1950).
- 3 [Jensen v. Alaska Valuation Service, Inc.](#), 688 P.2d 161 (Alaska 1984); [Central Missouri Professional Services, Inc. v. Shoemaker](#), 108 S.W.3d 6 (Mo. Ct. App. W.D. 2003); [Indep. Furniture Sales, Inc. v. Martin](#), 184 Ohio App. 3d 562, 2009-Ohio-5697, 921 N.E.2d 718 (8th Dist. Cuyahoga County 2009).
- 4 [Drakely v. Gregg](#), 75 U.S. 242, 19 L. Ed. 409, 1868 WL 11060 (1868); [Arnold v. All Am. Assur. Co.](#), 255 Ark. 275, 499 S.W.2d 861 (1973); [Colony of Wellfleet, Inc. v. Harris](#), 71 Mass. App. Ct. 522, 883 N.E.2d 1235 (2008); [Fuller v. Eastern Fire & Cas. Ins. Co.](#), 240 S.C. 75, 124 S.E.2d 602 (1962).
- 5 [Sullivan v. Bennett](#), 261 Mich. 232, 246 N.W. 90, 87 A.L.R. 791 (1933).

6 [Theis v. duPont, Glore Forgan Inc., 212 Kan. 301, 510 P.2d 1212 \(1973\).](#)

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XIV. Practice and Procedure

D. Questions of Law and Fact

§ 336. Nature and extent of authority

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  24, 79(7), 89(9), 124(1) to 124(3), 193

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[Implied or apparent authority of agent to purchase or order goods or merchandise, 55 A.L.R.2d 6](#)

Where the evidence is conflicting, or different reasonable inferences may be drawn from the evidence, the question of the nature and extent of the authority of an agent is one of fact to be determined by the trier of fact.¹ Thus, apparent authority is a question of fact.²

However, where the evidence as to the agent's authority is undisputed, or different reasonable and logical inferences may not be drawn therefrom, the question of authority is one of law for the court³ as is the question of whether a particular act at issue is within the agent's authority.⁴

The construction of a written contract creating an agency is for the court⁵ unless the instrument is ambiguous and depends upon conflicting extrinsic evidence; in such case, it is for the jury to determine the disputed questions of fact and for the court to construe the instrument in the light of the determination of the jury or to submit the question of the interpretation of the instrument to the jury under proper instructions.⁶

Whether one who dealt with an agent had notice, or was put on notice by the circumstances, of limitations on the authority of the agent is ordinarily a question for the jury⁷ as is the revocation of an agent's authority and notice thereof to one subsequently dealing with him or her.⁸

CUMULATIVE SUPPLEMENT

Cases:

Under Connecticut law, the nature and extent of an agent's authority is a question of fact for the trier where the evidence is conflicting or where there are several reasonable inferences which can be drawn. [Aviles v. Wayside Auto Body, Inc.](#), 49 F. Supp. 3d 216, 84 U.C.C. Rep. Serv. 2d 860 (D. Conn. 2014).

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Footnotes

- 1 [Law v. Cross](#), 66 U.S. 533, 17 L. Ed. 185, 1861 WL 7655 (1861); [Updike, Kelly and Spellacy, P.C. v. Beckett](#), 269 Conn. 613, 850 A.2d 145 (2004); [First Union Nat. Bank v. Brown](#), 166 N.C. App. 519, 603 S.E.2d 808 (2004); [Abadir v. Dellinger](#), 227 W. Va. 388, 709 S.E.2d 743 (2011).
- 2 [Kansallis Finance Ltd. v. Fern](#), 40 F.3d 476 (1st Cir. 1994), [certified question answered](#), 421 Mass. 659, 659 N.E.2d 731 (1996); [Digital Ally, Inc. v. Z3 Technology, LLC](#), 864 F. Supp. 2d 1050 (D. Kan. 2012); [Guy Maris Trust v. Truemper](#), 2012 Ark. App. 232, 2012 WL 1110059 (2012); [73-75 Main Ave., LLC v. PP Door Enterprise, Inc.](#), 120 Conn. App. 150, 991 A.2d 650 (2010).
- 3 [Green v. U.S.](#), 434 F. Supp. 2d 1116 (D. Utah 2006) (applying Utah law); [Mecham v. Consolidated Oil & Transp., Inc.](#), 2002 UT App 251, 53 P.3d 479 (Utah Ct. App. 2002); [Austin v. Kaness](#), 950 P.2d 561 (Wyo. 1997).
- 4 [N & D Fashions, Inc. v. DHJ Industries, Inc.](#), 548 F.2d 722, 20 U.C.C. Rep. Serv. 847 (8th Cir. 1976); [Rothschild v. Sugar Beet Products Co.](#), 174 Mich. 237, 140 N.W. 553 (1913); [Texas & P. Ry. Co. v. Lucas](#), 190 S.W. 800 (Tex. Civ. App. Dallas 1916).
- 5 [Brooks v. Collis Foods, Inc.](#), 365 F. Supp. 2d 1342 (N.D. Ga. 2005) (applying Georgia law).
- 6 [Clinton v. Hibbs' Ex'x](#), 202 Ky. 304, 259 S.W. 356, 35 A.L.R. 462 (1924); [Keyser v. Kemper](#), 157 Md. 437, 146 A. 275, 65 A.L.R. 641 (1929).
- 7 [R. H. Kyle Furniture Co. v. Russell Dry Goods Co.](#), 340 S.W.2d 220, 85 A.L.R.2d 428 (Ky. 1960).
- 8 [Wheeler v. McGuire](#), 86 Ala. 398, 5 So. 190 (1888).

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